VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,

v.

CRIMINAL NO. 102888
Hon. Jane Marum Roush

LEE BOYD MALVO,

Defendant

DEFENDANT MALVO'S MOTION FOR DISCOVERY AND INSPECTION

The defendant, Lee Boyd Malvo, by co-counsels, pursuant to Rule 3A:11 of the Rules of the Supreme Court of Virginia, and applicable constitutional case and statutory law, moves the court for disclosure of the following:

1. That pursuant to the authority enunciated in such case precedent as *Brady v. Maryland, 373 U.S. (1963), United States v. Agurs, 427 U.S. 87 (1976), Stover v. Commonwealth, 211 Va. 789 (1971), Dozier v. Commonwealth, 219 Va. 1113 (1979),* and *Fitzgerald v. Bass, 6 Va. App. 38, 366 S.E.2d 6156 (1988)*, the Commonwealth's Attorney produce and divulge to counsel for the defendant all information of whatever form, source or nature which tends to exculpate the defendant or reduce the penalty which he might suffer should be convicted in this cause through an indication of his innocence or through a potential impeachment of any prosecution witness, be it by inconsistent statements or otherwise. Such material would include, but is not limited to, the existence of any information which would tend to establish the guilty or complicity of others. This material would also include, but is not limited, to, all information of whatever form, source or nature which may lead to evidence which tends to exculpate the defendant or reduce the punishment which he might suffer if convicted in this cause, whether by indicating his innocence, implicating others, or impeaching the credibility

of any potential prosecution witness. This request includes all facts and information of whatever form, source or nature which are within the knowledge, custody and/or control of the Commonwealth's Attorney or his Assistants, or any law enforcement agency, including but not limited to the Police Department and Sheriff's Department of this jurisdiction, the Virginia State Police and any of their agents or witnesses who may testify in this cause.

2. That pursuant to *Giglio v. United States, 405 U.S. 150 (1972), Napue v. Illinois, 360 U.S. 264 (1959),* and *Moreno v. Commonwealth, 10 Va. App. 408, 415, 392 S.E.2d 836 (1990)(citing United States v. Bagley, 473 U.S. 667 (1985)*, the Commonwealth's Attorney produce and divulge to counsel for the defendant all evidence affecting the credibility of any prosecution witness, including, but not limited to, the following:

a. State the terms of any plea negotiation, promise, or thereat (direct or implied) made to any potential prosecution witness by or on behalf of the Commonwealth or any agency or officer thereof regarding any pending or potential prosecution of said witness for any criminal conduct, including any representation made regarding sentencing or sentencing recommendation(s) to be offered in regard to the witness;

b. State whether any potential prosecution witness has ever provided information or cooperation on any occasion to any law enforcement entity, including the Commonwealth or any agency or officer thereof, including in conjunction with the investigation of the matter(s) now pending against the defendant or related matters, or who is expected to do so in the future, and, if so, state what consideration, if any, monetary or otherwise, was or is to be given to said party for such information or cooperation; and

c. State whether any statement or other evidence attributed to the defendant was obtained by anyone who was then cooperating in any way with the Commonwealth's

investigation of the defendant and/or the subject offenses and, if so, identify the cooperating individual, when and under what circumstances such statements and/or evidence was obtained, and the nature and/or contents of such evidence. See *Main v. Moulton, 474 U.S. 159 (1985).*

3. That pursuant to Rule 3A:11(b)(1) of the Rules of the Supreme Court of Virginia, the Commonwealth's Attorney permit counsel for the defendant "to inspect and copy of photograph any relevant ... written or recorded statements or confessions made by the accused, or copies thereof, of the substance of any oral statements or confession made by the accused to an y law enforcement officer, the existence of which is known to the Attorney for the Commonwealth..." This material is requested to be displayed to the defendant or his counsel regardless of its potential use at trial by the Commonwealth.

4. That pursuant to Rule 3A:11(b)(1) of the Rules of the Supreme Court of Virginia, the Commonwealth's Attorney permit counsel for the defendant to inspect and copy or photograph any relevant "written reports of autopsies [including that of the victim], ballistic tests, [and] other scientific report ..." made in connection with the particular case, or copies thereof, that are known by the Commonwealth's Attorney to be within the possession, custody or control of the Commonwealth.

5. That pursuant to Rule 3A:11(b)(2) of the Rules of the Supreme Court of Virginia, the Commonwealth's Attorney allow counsel for the defendant the opportunity to inspect and copy or photograph all books, papers, documents, tangible objects, buildings or places or copies of portions thereof that have been seized or a record made thereof as evidence against the defendant, as well as copies of any photographs that may have been displayed to any individual in an effort to identify the perpetrator or perpetrators of the subject offenses and copies of any written record of any "lineup" procedure utilized in the investigation of the case(s) or any related

matter. This material is requested to be provide to counsel for the defendant regardless of its potential use at trial by the Commonwealth.

6. That pursuant to the Sixth (Effective Assistance of Counsel), Fifth and Fourteenth (Due Process) Amendments of the Constitution of the United States, Article I, §8 (Confrontation), and §11 (Due Process) of the Constitution of the Commonwealth of Virginia, Rule 3A:11 of the Rules of the Supreme Court of Virginia, and applicable case law, the Commonwealth's Attorney be ordered to divulge to counsel for the defendant the following:

a. All Information concerning the defendant's prior criminal record, if any, including, but not limited to, felony convictions and misdemeanor convictions involving moral turpitude;

b. All information concerning the prior criminal record, if any, of all witnesses that will be used by the Commonwealth at trial, including, but not limited to, copies of said criminal records;

c. Copies of all arrest warrants, search warrants and affidavits utilized in the investigation of this case or related matters.

d. All items of tangible or demonstrative evidence which the Commonwealth intends to offer as evidence at trial;

e. Any scientific reports in the possession of the Commonwealth or any of its agents not otherwise disclosed pursuant to paragraph 4 herein, including, but not limited, to all written reports of any psychiatric, psychological and/or medical reports concerning the defendant or any potential witness;

f. A description of the nature and/or content of all "common scheme" evidence or evidence of any uncharged conduct which the Commonwealth intends to offer into evidence at

any stage of the trial proceedings, including the penalty phase, which is not the subject of any of the pending charges and by which the Commonwealth would seek to establish, among other things, absence of mistake, innocent purpose, intent, motive, common scheme or design (See e.g., *Barbar v. Commonwealth, 5 Va. App. 172, 360 S.E.2d 888 (1987)* or any of the aggravating factors relevant to the determination of sentence. See, VA. Code §19.2-264.3:2. See also, *Barnabei v. Commonwealth, 252 Va. ___, ___ 1996 W.L 517733 at 4-5 (1996); Roach v. Commonwealth, 251 Va. 324, 339, 468 S.E.2d, 107 (1996).* Such information is requested in advance of trial so that counsel for the defendant can investigate the accuracy of such additional allegations and, if necessary and appropriate, move the court, in limine, to restrict and or preclude the admissibility of such evidence before it is presented to the tier-of-fact;

g. All information and evidence of whatever form, source or nature which tends to exculpate the defendant such as copies of any prior inconsistent statement(s) attributed to any potential prosecution witness, including any summary of any such statement(s), and any statements or information of any kind provided by or attributed to any person that would exonerate or tend to exonerate the defendant from involvement in this case, including any admissions or false exculpatory statements by other parties. Such statements would include any that may have been made by any party during or in conjunction with a polygraph examination; and

h. In accordance with §19.2-61 through §19.2-70 of the Code of Virginia, as amended, the contents of any intercepted wire or oral communication or evidence derived therefrom that was obtained during the investigation of the subject offense and/or related offenses.

It is understood and submitted that the Commonwealth's obligation to provide such of the requested information as may be ordered by the court is continuing in nature. It is otherwise asserted in support of the instant motion that the requested information is relevant and necessary to the preparation of the defense herein and that the items are evidentiary in nature such that the production of such is reasonable and necessary and will otherwise expedite the trial of this cause.

Respectfully submitted,

LEE BOYD MALVO

By _____
Co-Counsel

and

By ____
Co-Counsel

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CERFICATE OF SERVICE

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Judge
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this 10th day of Febeuary, 2003.

Co-Counsel

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Defendant

MOTION FOR TIMELY DISCLOSURE OF EXCULPATORY EVIDENCE

Comes now defendant, Lee Boyd Malvo, by and through his co-counsels, to the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny[+], and sections Eight and Eleven of Article I of the Constitution of Virginia, and moves for an order requiring the Commonwealth to make timely disclosure of exculpatory evidence relevant to all aspects of his trial.

In this motion, wherever reference is made to "the Commonwealth" the request shall be deemed also to request the same facts and information in whatever form, source or nature which are within the knowledge, custody and/or control of (1) the Commonwealth's Attorney or his assistants, (2) the Virginia State Police, (3) any other law enforcement departments or agencies of this or any other state or of the federal government which the Commonwealth's Attorney might reasonably be expected to

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[+] Giles v. Maryland, 386 U.S. 66 (1967); Giglio v. U.S. 405 U.S. 150 (1972); U.S. v. Bagley, 437 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995); Strickler v. Greene, 527 U.S. 263 (1999).

believe to have such information, or (4) any person whom the Commonwealth's Attorney may call as a witness.

A. The defendant moves for an Order requiring the Commonwealth's Attorney to deliver or provide defendant access to the following:

1. Any and all evidence that the defense may use, alone or in conjunction with other evidence, that bears on the character or quality of the police investigation, such as any evidence that the police did not pursue certain leads or suspects, or that the police tampered with or planted evidence.

2. Any and all confessions or statements of any kind made by defendant or any alleged co-conspirator that may be pertinent to this case in every media in which each such confession or statement may exist.

3. The names and addresses of all persons the prosecution proposes to offer as witnesses at the trial or any hearing of this case, and any persons with knowledge of any facts and circumstances surrounding the crime or the defendant.

4. The names and addresses of all persons who have given recorded statements to the Commonwealth.

5. The names and addresses of all persons who have given oral statements to the Commonwealth.

6. Any and all information concerning any alleged prior criminal record of the defendant, including but not limited to, felony and moral turpitude misdemeanor convictions.

7. All memoranda, documents, and reports to, from, and between law enforcement officers connected with any matter relating to the statements and

information provided by any alleged participants or any other witnesses regarding the defendant in the killing.

8. All memoranda, documents and reports to, from and between the investigative staff of the prosecution, excluding those portions, if any, which contain the opinion, theories, or conclusions of the prosecuting attorney or members of his legal staff.

9. Any oral or written statement made by any alleged participants or any other witnesses during police investigations and inquiries including, but not limited to, defendant's role or involvement in the killing of the victim and events surrounding the killing, before, during, and after, which is exculpatory in any matter as to the defendant.

10. Any oral or written statement made by any alleged participants or any other witnesses that diminishes or negates the role of the defendant in the murder of the victim and events surrounding it, before, during, and after.

11. Any information from any person, including but not limited to other witnesses, that the defendant was not involved in or was not the actual cause of the death of the victim.

12. Any and all records and information revealing prior felony convictions or guilty verdicts or juvenile adjudications attributed to each witness to be called by the Commonwealth at any hearing in or trial of this case, including but not limited to relevant "rap sheets."

13. Any and all records and information revealing prior misconduct or bad acts attributed to any witness.

14. Any and all consideration or promises of consideration given to, expected, or hoped for by a witness. By "consideration," the defendant refers to absolutely

anything, whether bargained for or not, which arguably could be of value or use to such a potential witness or to persons of concern to such a witness, including but not limited to formal or informal, direct or indirect promises of leniency, favorable treatment, recommendation or other assistance with respect to any pending or potential criminal, parole, probation, pardon, clemency, civil, tax court, court of claims, administrative, public assistance, or other dispute with the Commonwealth, another sovereign, or any local government.

15. Any and all threats, express or implied, direct or indirect, or other coercion made or directed against any potential witness including but not limited to; criminal prosecutions, investigations, or potential prosecutions pending or which could be brought against any potential witness; any probationary, parole, deferred prosecution or custodial status of any potential witness; and any civil, tax court, court of claims, administrative, public assistance, or other pending legal disputes or transactions involving any potential witness with the Commonwealth or over which the Commonwealth has real, apparent or perceived influence.

16. The existence and identification of each occasion on which any potential witness has testified before any court, grand jury, or other tribunal or body or otherwise officially narrated in relation to any of the defendants, the investigation, or the facts of this case.

17. The existence and identification of each occasion on which each potential witness who was or is an informer, accomplice, or co-conspirator has testified before any court, grand jury, or other tribunal or body.

18. All memoranda, documents, and reports to, from and between law enforcement officers connected with any matter relating to the statements and information provided by the jailhouse informants who allegedly heard the defendant make an incriminating statement, including but not limited to documents relating to the jailhouse informants. These reports may include but are not limited to police investigations of the crimes or other activities of the jailhouse informants.

19. All memoranda, documents and reports to, from and between the investigative staff of the Commonwealth, relating to matters set forth in paragraph 18, excluding those portions, if any, which contain the opinion, theories, or conclusions of the prosecuting attorney or members of his legal staff.

20. Any oral or written jailhouse informants' statements concerning the defendants's alleged killing of the victim that are inconsistent with statements of other persons, including but not limited to anyone interviewed by agents of the Commonwealth.

21. Any oral or written statements from any other parties that would in any way cast doubt on the truthfulness of the jailhouse informants' statements concerning the defendant's alleged statements.

22. Any statements made by the jailhouse informants regarding the defendant's alleged statement, which are inconsistent with other statements, oral or written of the informant, or inconsistent with other facts gathered by agents of the Commonwealth.

23. Any oral or written jailhouse informants' statements concerning the defendant's alleged statement that are internally inconsistent, including but not limited to statements made by the informants.

24. Any other information that would tend to undermine the credibility of the jailhouse informants, including but not limited to promises, inducements, or any agreements made with Commonwealth agents.

25. Records of the jailhouse informant as an informant or witness for the Commonwealth, another state, or the United States in other cases.

26. Any other exculpatory information concerning the jailhouse informants.

27. Any competency hearing reports or other documents relating to credibility from prosecutions of the jailhouse informants in unrelated matters.

28. All pre-sentence reports when jailhouse informants are the subject.

29. Any relevant oral statements made by the jailhouse informants to police but not recorded in writing by police when such statements were made.

30. Any information from any person, including but not limited to other prisoners and guards, that the defendant did not make the statements allegedly heard by the jailhouse informants.

31. Any information from any person, including but not limited to other prisoners and guards, that the jailhouse informants have a propensity or motive to lie.

32. Any information from any person, including but not limited to the jailhouse informants, other prisoners or guards, that the jailhouse informants had personal animosity against the defendant.

33. Information on the circumstances under which the defendant's statements were allegedly made including but not limited to how the jailhouse informants heard the defendant's statements, the context in which the statements were made, who initiated the conversation/verbal exchange that resulted in the statements being made, who the

defendant was making the statements to, on what date and at what time the statements were made, where the statements were made, where the jailhouse informants who allegedly heard the statements were in relation to the defendant when he allegedly made the statements, who else was present when the defendant made the statements, who else may have heard the statements, what allegedly caused the defendant to make the statements.

34. Any information on the relationship between the defendant and the jailhouse informants including but not limited to any prior history between the defendant and the jailhouse informants, and whether anyone of the jailhouse informants were ever placed in a cell with the defendant.

35. All scientific reports prepared by an agent of the Commonwealth or at the request of the Commonwealth in this case, regardless of their potential use at trial.

36. All tangible, demonstrative, and physical evidence in the case, including, but not limited to any weapons, clothes, motor vehicles and/or parts or items removed therefrom, personal items, hair, blood, fibers or documents, and other physical evidence which may be in the possession of the Commonwealth's Attorney, agents, or others within the knowledge or control of the Commonwealth.

37. All statements made to police witnesses together with a copy of any Miranda sheet or other document purporting to prove that the defendant waived his rights, after law enforcement advice, before making a statement.

38. All statements made to witnesses who are not law enforcement employees or government agents specifying the date, time, place and circumstances surrounding any such statements.

39. Any and all other records and/or information which arguably could be helpful or useful to the defense in impeaching or otherwise detracting from the probative force of the Commonwealth's evidence or which arguably could lead to such records or information.

40. Any evidence of circumstances surrounding any alleged misconduct of defendant which the Commonwealth intends to offer in the event of a penalty trial in this case, which would tend to explain the conduct or proves to be mitigating, including but not limited to family crisis, financial strain, or employment stressors.

41. All memoranda, documents, and reports to, from and between law enforcement officers connected with any matter intended to be offered by the Commonwealth if a penalty trial occurs in this case. Including but not limited to police investigations of other suspects or any evidence relating to the thoroughness and good faith of the prosecution, police officers and investigators for the Commonwealth.

42. All memoranda, documents and reports to, from and between the investigative staff of the prosecution, relating to matters set forth in paragraph 41, excluding those portions, if any, which contain the opinion, theories, or conclusions of the Commonwealth's Attorney or members of his legal staff.

43. Direct information about the circumstances of defendant's conduct that would suggest appropriateness of a more lenient sentence, including provocation, stress, etc.

44. Direct evidence of laudatory conduct by defendant.

45. Any and all evidence that alone or in conjunction with other evidence of any character may cast doubt upon the defendant's guilt.

46. Any and all information that alone or in conjunction with other evidence calls into question the credibility of the Commonwealth's case including, but not limited to, information that indicates that the testimony of prosecution witnesses is inconsistent with other information in the Commonwealth's actual or constructive possession.

47. Any and all evidence that alone or in conjunction with other evidence may be exculpatory in arguing for a sentence less than death including, but not limited to, information concerning the Commonwealth's theories justifying the crime charged.

48. Witness statements concerning the unadjudicated acts that are inconsistent with statements of other witnesses.

49. Witness statements concerning the unadjudicated that are internally inconsistent.

50. Statements from other parties confirming or denying the unadjudicated acts.

51. Any other information that would tend to undermine the credibility of a witness who will testify about the unadjudicated acts, including promises, inducements, personal animosity or bias toward defendant.

52. Any other information that would tend to undermine the credibility of a witness who will testify about unadjudicated acts, including promises, inducements, personal animosity or bias toward defendant.

53. All evidence concerning the professionalism and good faith of the police investigation of the unadjudicated acts, including information on other suspects.

54. Any other evidence of the circumstances of the crime or the character and record of any party to the crime that would tend to show that another party was more culpable, more dominant or more dangerous than the defendant.

55. Any evidence that is probative of the credibility of a witness for the prosecution who will testify as an expert in psychiatry, psychology, or predicting future dangerousness, including, but not limited to:

(a) a complete account of any instance in which the expert examined or attempted to examine a criminal defendant for future dangerousness without obtaining waiver of his Miranda rights and notifying the defendant's lawyer about the examination and its scope in advance.

(b) copies of the result of every examination for future dangerousness that the expert has performed in a capital murder trial in which he was either appointed by the court as a neutral expert or hired by the prosecution as an expert or, in the alternative, if the results are a matter of public record, the name of each defendant examined, the venue, the cause number, and the date the results were filed in the record.

(c) the criminal record, prison disciplinary record and parole record of every defendant who has been sentenced to death in a Virginia murder trial in which the expert testified for the prosecution and predicted on the basis of an examination or a hypothetical question that the defendant would be dangerous.

(d) the name, venue, and case number of every capital murder trial in Virginia in which the expert has testified for the prosecution about the issue of future dangerousness.

(e) the name, venue, and case number of every capital murder trial in Virginia in which the expert has testified for the defense about the issue of future dangerousness.

(f) the name, venue, and case number of every capital murder case in Virginia in which the expert was appointed by a court or hired by a prosecutor to determine whether the defendant was dangerous and the expert concluded that the defendant was not dangerous or concluded that he lacked sufficient information to render an opinion.

(g) the name, venue, and case number of every capital murder case in Virginia in which the expert testified that the defendant would be dangerous and later concluded that his opinion was mistaken or based on insufficient data.

(h) any data, notes or other information compiled by the expert or his agents in an effort to determine that his predictions of future dangerousness in capital murder trials were either accurate or inaccurate.

(i) a transcript of any false testimony given under oath by the expert about his qualifications, his method of predicting future dangerousness or the facts of a particular case in which he predicted future dangerousness, irrespective or whether the expert knew at the time that his testimony was false.

(j) a complete account of any case in which the expert was accused of professional malpractice, violating the Hippocratic oath or any other kind of professional misconduct in a proceeding conducted by a court, a government agency or a professional society.

56. The defendant moves for an Order requiring the Commonwealth to secure and preserve any handwritten notes of any law enforcement officer, government agent or informant involved in this case, in order to assure their production in court, if and when ordered by the court.

57. A report by the Commonwealth detailing any evidence in any form or medium, once in existence but now lost or destroyed, covered by paragraphs 1-56 above, along with an explanation of how the evidence came to be lost or destroyed. The defendant asks that all orders for discovery and production requested herein direct that the duty of the Commonwealth regarding the disclosure of the foregoing information and material continues until trial and shall not be dependent upon further motions; that the disclosure and production by the Commonwealth shall proceed forthwith with all reasonable speed; that information for which the Commonwealth is responsible be disclosed to the defense in any event no later than May 1, 2003, or such other date certain as may be ordered after hearing on this matter; that upon receipt or learning of the existence of any of the aforementioned information not now known to the Commonwealth, or in its possession, disclosure shall be made to the defense within seven (7) days of such receipt or knowledge.

B. The defendant further respectfully prays that the Court order that any as to evidence of uncertain exculpatory value or materiality, the Commonwealth deliver such evidence to the court to be reviewed in camera to determine whether the information is constitutionally required to be disclosed to the defendant in any part of the capital trial.

Respectfully submitted,

LEE BOYD MALVO

By_____
Co-Counsel

and

By___
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CERTIFICATE OF SERVICE

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Co-Counsel

Co-Counsel

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Defendant.

MOTION TO REQUIRE THE COMMONWEALTH TO REVEAL ANY AGREEMENT ENTERED INTO BETWEEN THE COMMONWEALTH AND ANY PROSECUTION WITNESS THAT COULD CONCEIVABLY INFLUENCE HIS TESTIMONY

COMES NOW the defendant, Lee Boyd Malvo, by his co-counsels, and moves the Court to issue an Order requiring the Commonwealth to reveal any agreement entered into between the Commonwealth's Attorney's office, any other prosecutor's office, or any other law enforcement agency and any prosecution witness that could conceivably influence said witness' testimony on the following grounds:

1. That the credibility of said witness will be an important issue in the principal case, and the evidence of any understanding or agreement as to future prosecution or any other consideration would be relevant to such witness' credibility, and the trial jury is entitled to know of it.

2. That a refusal to reveal any said agreement constitutes a violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

LEE BOYD MALVO.

By _____
Co-Counsel

and

By_____
Co-Counsel

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Defendant

MOTION FOR BILL OF PARTICULARS AS TO AGGRAVATING FACTORS

This day comes the defendant, Lee Boyd Malvo, by his co-counsels, and states:

1) That the defendant is charged with capital murder under alternative theories alleging a violation of Virginia Code § 18.2-31(8) and § 18.2-31(13).

2) The defendant is represented by appointed counsel

3) That in order for a jury to impose a penalty of death, the Commonwealth must prove beyond a reasonable doubt that the defendant's action were outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder (vileness), and/ or that the defendant would commit criminal acts of violence that constitute a continuing serious threat to society. (future dangerousness)

4) That the language contained in § 19.2-264.4 does nothing to guide the jury or give any information which would distinguish the defendant's situation from any other.

5) That the defendant moves this Court to enter an order which requires the Commonwealth to identify the aggravating factor or factors upon which it intends to rely in seeking the death penalty should the defendant be convicted of capital murder.

6) That if the Commonwealth intends to rely upon the vileness aggravating circumstance as set forth in Virginia Code § 19.2-264(c), to identify as many of the components of the vileness aggravator including torture, depravity of mind, or aggravated battery, on which it intends to offer evidence.

7) That if the Commonwealth intends to rely upon the vileness aggravator, to identify the factors which cause the defendant's actions to be sufficiently different from other defendants so as to warrant imposition of the death penalty.

8) That if the Commonwealth intends to rely upon the vileness aggravator as set forth in § 19.2-264(c) to identify with specificity each and every narrowing construction of that factor.

9) That if the Commonwealth intends to rely upon the future dangerousness aggravator of § 19.2-264(c) and including unadjudicated conduct as set forth in §19.2-264.3:2, to identify the factors which cause the defendant to constitute a continuing serious threat to society or identify him as a person who would commit criminal acts of violence.

10) That if the Commonwealth intends to rely upon the future dangerousness aggravating circumstance as set forth out in § 19.2-264.4 (c) to further identify every narrowing construction of any factor on which in intends to offer evidence.

WHEREFORE, the defendant, by counsel, prays this Honorable Court to grant the requested relief.

Respectfully submitted,

LEE BOYD MALVO

By _____
Co-Counsel

and

By _____
Co-Counsel

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We/I hereby certify that a true copy of the foregoing Motion/Memorandum was mailed, first class mail to:

Robert F. Horan, Jr., Esquire
Commonwealth's Attorney
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and the original was forwarded for filing to:

Hon. John T. Frey
Clerk
Fairfax County Circuit Court
Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, VA 22030-4009

and a true copy was forwarded to the

Hon. Jane Marum Roush
Judge
Fairfax County Circuit Court
Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, VA 22030-4009

this 10th day of February, 2003.

Co-Counsel

Co-Counsel

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,
Plaintiff

v.

LEE BOYD MALVO,
Defendant

CRIMINAL CASE NO. 102888
Hon. Jane Marum Roush

MOTION TO DECLARE THE VIRGINIA CAPITAL MURDER AND DEATH PENALTY STATUTES UNCONSTITUTIONAL AND TO PROHIBIT THE IMPOSITION OF THE DEATH PENALTY ON THE GROUNDS THAT THE VIRGINIA DEATH PENALTY STATUTES VIOLATE THE VIRGINIA AND UNITED STATES CONSTITUTIONS

Defendant, Lee Boyd Malvo, by and through his counsel, moves this court to prohibit the imposition of the death penalty against him on the grounds that the Virginia death penalty statutes, specifically Virginia Code §§ 19.2-264.2 through 19.2-264.5 and 17.1-313,[1] on their face and as applied, violate the Eighth Amendment prohibition against cruel and unusual punishment, the Sixth Amendment guarantee to a fair trial, and the Fourteenth Amendment guarantee that no person shall be deprived of life, liberty, or property without due process of law. The grounds for this motion are set forth in the accompanying Memorandum of Law in Support of Defendant's Motion to Declare the Virginia Death Penalty Statutes Unconstitutional. The grounds are based on Defendant's rights to be informed of the nature and cause of the action against him, to effective assistance of counsel, to a fair and impartial jury, to present a defense, to confront his accusers, to freedom from cruel and unusual punishment, to due process, and to

[1] The constitutionality of Virginia Code Section 19.2-264.3:1 is not addressed by this motion. Defendant reserves the right to challenge section 19.2-264.3:1, as portions of that statute are unconstitutional.

equal protection of the law, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as Article I, Sections 8, 9 and 11 of the Virginia Constitution.

Those aspects of the application of Virginia's capital murder statutes, detailed more completely in the Memorandum of Law in support of this motion, which this Court is without authority to remedy because of decisions of the Supreme Court of Virginia, themselves render exposure of defendant to a sentence of death unconstitutional. Nevertheless, as to those matters and procedures, also detailed in the Memorandum of Law supporting this motion, wherein this Court retains discretion, defendant contends that the exercise of that discretion in the manner prayed for is supported by law and prays that it be so exercised.

The defendant therefore requests that the Virginia capital murder statutes named above be declared unconstitutional, that the charge of capital murder against the defendant be dismissed, or in the alternative that an order issue prohibiting imposition of a death sentence in this cause.

Respectfully submitted,

LEE BOYD MALVO

By_____
Co-Counsel

and

By_____
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CERTIFICATE OF SERVICE

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this 10th day of February, 2003.

Co-Counsel

Co-Counsel

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA, Plaintiff	)	
v.	)	CRIMINAL CASE NO. 102888 Hon. Jane Marum Roush
LEE BOYD MALVO, Defendant	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTIONS TO DECLARE THE VIRGINIA CAPITAL MURDER AND DEATH PENALTY STATUTES UNCONSTITUTIONAL AND TO PROHIBIT THE IMPOSITION OF THE DEATH PENALTY

INTRODUCTION

This is a capital murder case in which trial is presently scheduled to begin November 10, 2003. The issue before the Court is whether Virginia's capital murder and death penalty statutes, which have never been reviewed by the United States Supreme Court, are constitutional such that the Defendant may lawfully be tried and sentenced pursuant to these statutes. As is more set out fully below, the Virginia capital murder and death penalty provisions are unconstitutional under both the United States and the Virginia Constitutions for several reasons.

First, contrary to controlling U.S. Supreme Court precedent, the Virginia statutes fail to provide meaningful guidance to the jury. The two aggravating factors the jury must consider in determining whether to impose the death penalty, "vileness" and "future dangerousness," are unconstitutionally vague and do not provide the sentencer with meaningful instruction to avoid the arbitrary and capricious infliction of a death sentence. This shortcoming in the statute is exacerbated by Virginia's failure to require jury instructions as to the meaning of these terms. In particular, this

lack of jury instruction violates at least the Eighth and Fourteenth Amendments to the United States Constitution, and Sections 9 and 11 of Article I of the Virginia Constitution. This issue is discussed in full in Part I.

Second, in addition to not providing the jury with guidance regarding the application of aggravating and mitigating factors, the Virginia scheme fails properly to inform and instruct the jury on its consideration of mitigating evidence. This omission, which is discussed in Part II impermissibly exposes Defendant to the substantial risk that he will be killed without regard to evidence that calls for a lesser sentence. Accordingly, for this reason as well, Defendant's Eighth and Fourteenth Amendment rights, and his rights under Sections 9 and 11 are violated.

Third, the Virginia statute violates the Eighth and Fourteenth Amendments' heightened reliability requirement for capital sentencing because it allows the Commonwealth to prove the statutory aggravating factor of future dangerousness by evidence of unadjudicated criminal conduct and fails to require that the state satisfy any standard of proof before such conduct may be used. This issue is fully discussed in Part III.

Fourth, the Virginia statute is unconstitutional because it allows, but does not require, that the sentencing court set aside a death sentence upon a showing of good cause and permits the court to consider hearsay in the post-sentence report. These deficiencies, which expose Defendant to substantial risk that his rights to confrontation, to due process, to effective assistance of counsel and to freedom from cruel and unusual punishment, will be violated, and are discussed in Part IV.

And Fifth, the appellate review procedures of the Virginia statutory scheme render it unconstitutional. The failure of the Virginia Supreme Court to conduct proportionality and passion/prejudice review consistent with the Eight Amendment and other federal and state constitutional

provisions are discussed in Part V.

ARGUMENT

I. VIRGINIA'S DEATH PENALTY STATUTES FAIL TO PROVIDE MEANINGFUL GUIDANCE TO A JURY.

In Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court invalidated death penalty statutes nationwide because their provisions were unconstitutionally vague. Provisions are unconstitutionally vague if they fail to provide the sentencer with a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." Id. at 313 (White concurring). In reaffirming its holding in Furman, the Supreme Court made clear that

> where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Gregg v. Georgia, 428 U.S. 153, 189 (1976).

The state bears the constitutional burden of minimizing the risk of arbitrary and capricious imposition of any death sentence. In this regard the United States Supreme Court declared in Godfrey v. Georgia, that

> if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." . . . It must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death."

446 U.S. 420, 428 (1980)(citations omitted).

As previously stated, Virginia's death penalty statutes provide for two aggravating factors. The Commonwealth must prove beyond a reasonable doubt one or both of them before the jury may impose the death penalty. Virginia Code Sections 19.2-264.2 and 19.2-264.4(C). The first aggravating factor -- the "future dangerousness" factor -- requires the Commonwealth to prove "that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society." Virginia Code Section 19.2-264.2. The second factor -- the "vileness" factor -- requires the Commonwealth to prove that the defendant's "conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Id.

As discussed below, neither of these aggravating factors provides meaningful instruction to the sentencer to avoid the arbitrary and capricious infliction of a death sentence. Therefore, each aggravating factor must be declared unconstitutional, and, consequently, neither may be relied upon by a jury to sentence defendant to death. U.S. Const., Amends. VI, VIII, XIV; Va. Const., Art. I, §§ 8, 9, and 11. To understand the importance of these constitutional failures, it is important to review the provisions of Virginia Code Section 19.264.4, which sets forth procedures for a jury to fix a penalty of death.[2]

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[2] Defendant challenges Virginia's failure to provide meaningful instruction to a sentencing jury, on the following constitutional grounds: the prohibitions on cruel and unusual punishment found in the Eighth Amendment to the United States Constitution and Section 9 of Article I of the Virginia Constitution; the right to a fair and impartial jury under the Sixth Amendment to the United States Constitution and Section 8 of Article I of the Virginia Constitution, and the rights to due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution and Section 11 of Article I of the Virginia Constitution. Each of these grounds is also relied upon to support defendant's challenges to

A. The Vileness Factor Set Forth In Virginia Code Sections 19.2-264.2 and 19.2-264.4(C) Is Unconstitutional.

As previously stated, Virginia's death penalty scheme includes an aggravating factor of "vileness." That factor requires the Commonwealth to prove that the defendant's "conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Va. Code §§ 19.2-264.2 and 19.2-264.4(C)(1991). Neither Virginia's vileness factor, nor any construction of it, has been passed upon by the United States Supreme Court. However, precedent dictates that the statutory language on its face and as applied in Virginia violates the federal constitution.

1. The unadorned statutory terms are unconstitutionally vague.

This case is controlled by Godfrey v. Georgia, 446 U.S. 420 (1980), and the cases that follow Godfrey. In Godfrey, a plurality of the U.S. Supreme Court declared unconstitutional Georgia's codified aggravating factor that is identical to Virginia's "vileness" factor. The aggravating factor at issue in Godfrey allowed a jury to sentence a person to death if his offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Id. at 422 (1978) (citing Ga. Code § 27-2534.1(b)). The trial judge in Godfrey quoted this statutory language to the Georgia jury, but provided no further instruction. The United States Supreme Court made clear that

> [t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman."

Virginia's failure to instruct on mitigation discussed in Part II of this memorandum.

Id. at 428-29. Finding the unadorned statutory language vague, the Court rejected as unconstitutional "[t]he standardless and unchanneled imposition" of the death sentence. That is a death sentence imposed by "a basically uninstructed jury" which had "uncontrolled discretion." Id. at 429. The "jury's interpretation of [the vileness factor]" said the Court, "can only be the subject of sheer speculation." Id. at 428-29. Because there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not," the Court reversed Godfrey's death sentence. Id. at 433.

More recently, in Maynard v. Cartwright, 486 U.S. 356 (1988), the Supreme Court invalidated Oklahoma's death penalty statute, which provided that a sentence of death could be imposed if the defendant's offense was "especially heinous, atrocious, or cruel." Okla. Stat., Tit. 21, §§ 701.12(2) and (4)(1981). The Supreme Court concluded that its decision in Godfrey controlled Maynard. Because "'especially heinous, atrocious, or cruel' gave no more guidance than 'outrageously or wantonly vile, horrible or inhuman,'" the Court declared that the statutory language was overbroad and vague, and it set aside Maynard's death sentence. Id., at 364.

After Godfrey and Maynard, the Supreme Court did uphold Arizona's limiting construction of "especially heinous, cruel or depraved," in a case in which the trial court, rather than a jury, imposed sentence. Walton v. Arizona, 497 U.S. 639 (1990). In doing so, the Supreme Court took care to distinguish sentences imposed by judges from those imposed by juries. Recognizing that juries must be provided with meaningful, thorough, and unequivocal instructions, The Court declared

> [w]hen a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It

> is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in Maynard and Godfrey.

Id., at 653.

In 1994, the Court further clarified the necessity of clear and unambiguous direction to sentencing juries. In Tuilaepa v. California, 512 U.S. 967 (1994), the Court addressed the California death penalty statute. In doing so, the Court noted that to meet the distinctive procedural requirements of the Eighth Amendment, a state must clearly limit eligibility for the death penalty. The factors or aggravators that will cast a defendant into the ring of the death-eligible must apply only to a subclass of defendants and must not be vague. Id. at 976. In Espinosa v. Florida, 505 U.S. 1079 (1992), the Court held that states must actively ensure that aggravators meaningfully narrow the class of death eligible defendants, and that the eligibility process must also justify the imposition of death over life imprisonment. The decision in Tuilaepa indicates that these requirements are the function of eligibility criteria. In Virginia, the vileness factor is an eligibility requirement. In order for a defendant to become death eligible, the underlying statutory crime and either vileness or future dangerousness must be proven beyond a reasonable doubt. Va. Code Ann. § 19.2-264.4(c) (1990). Vileness is a threshold eligibility requirement in the Virginia capital sentencing scheme, yet it altogether fails to limit and genuinely direct the jury's discretion as is required by Tuilaepa.

In 1979, prior to the Supreme Court's decisions in Godfrey, Maynard, and Walton, the Virginia Supreme Court upheld a death sentence that was imposed on the basis of a jury instruction that repeated, but did not construe, the statutory language of the aggravating factor of vileness set forth in Section 19.2-264.4(C). Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784, 790, 797. The Court claimed in Clark that each of the elements of the state's aggravating factor of vileness has

an "accepted meaning." Id. at 790; see, e.g., Bunch v. Commonwealth, 225 Va. 423, 304 S.E.2d 271 (1983), cert. denied, 464 U.S. 977 (1983). Virginia's vileness factor, however, is **identical** to that found unconstitutional in Godfrey. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135, 149 (1978), cert. denied, 441 U.S. 967 (1979) (vileness aggravating factor in Virginia death penalty "is the same as that in the Georgia statute.").[3]

Just as the Supreme Court's decision in Godfrey controlled its decision in Maynard, so too does the Godfrey decision and its progeny control the decision in this case. Accordingly, as a matter of federal constitutional law, the vileness provision of the Virginia death penalty statute, without further elucidation, is void for vagueness. Because the Virginia Supreme Court's decision in Clark predates Godfrey and because Clark's progeny do not distinguish Godfrey, they are inconsistent with the requirements of the United States Constitution that prohibit the "arbitrary and capricious infliction of the death sentence." Clark and its progeny must not be followed. Godfrey, 446 U.S. at 428; Maynard, 486 U.S. 356; Walton, 497 U.S. 639, (1990).[4]

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[3]In this regard, while the Virginia Supreme Court in Clark, 220 Va. 201, 257 S.E.2d at 790, urged that the elements of the "vileness" aggravating factor have accepted meanings, which are set forth in Smith, 219 Va. 455, 248 S.E.2d at 149, there was no representation that the Smith definitions of those elements are the only meanings attributable to those terms. The certainty necessary to impose the death sentence is not present where reasonable persons could differ as to the meaning of any term used to establish an aggravating factor. Cf. e.g., Lockett v. Ohio, 438 U.S. at 604; Eddings v. Oklahoma, 455 U.S. at 104.

[4] The Virginia Supreme Court does not require instruction of, nor do trial courts usually instruct, a sentencing jury on any limiting construction of the aggravating factor of "vileness." See, e.g., Clark, 220 Va. at 211, 257 S.E.2d at 790. Indeed, Virginia's model jury instructions offer no definition of any aspect of the state's aggravating factor of "vileness". Va. Model Jury Instruction Nos. 33.122, 33.125. Because Virginia relies upon the unadorned statutory language to define the aggravating factor of "vileness," that aggravating factor is unconstitutional as applied in Virginia. Walton, 497 U.S. at 653. Shell v. Mississippi, 498 U.S. at 2 (1990)(Marshall J. concurring). For this reason as well, the aggravating factor of "vileness" may not be presented to, or considered by, any sentencing jury in this case.

2. The vileness factor as applied in Virginia is unconstitutionally vague.

An unconstitutionally vague statute may be saved if a state limits its construction to provide "meaningful guidance to the sentencer." Walton, 497 U.S. 639. Limiting instructions, however, may themselves be unconstitutionally vague. Shell v. Mississippi, 498 U.S. 1 (1990).

In 1990, relying expressly upon Godfrey and Maynard, the United States Supreme Court invalidated a limiting instruction used by a trial court in a capital murder case to construe Mississippi's aggravating factor of "especially heinous, atrocious, or cruel." Shell, 498 U.S. at 1. The trial court's limiting instruction read

> the word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others.

Id. at 2 (Marshall, J., concurring).

In concurring with the per curiam opinion by the Court, Justice Marshall concluded that this limiting instruction "clearly fail[ed]" to give content to the statutory factor that is itself too vague to provide meaningful guidance to the sentencer. Id. at 4. The Justice found that these words "could be used by '[a] person of ordinary sensibility [to] fairly characterize almost every murder.'" Id.. "Indeed," he declared that "there is no meaningful distinction between these latter formulations and the 'outrageously or wantonly vile, horrible and inhuman' instruction expressly invalidated in Godfrey v. Georgia." Id.

With respect to the individual definitions of "cruel," "heinous" and "atrocious," Justice Marshall in Shell emphasized that only one definition need be constitutionally infirm to require a death sentence to be set aside. Id. at 1. Accordingly, in cases in which alternative bases

for an aggravating factor are provided to the jury, each base or element must provide principled guidance to the sentencer or that aggravating factor may not be relied upon at all to support a sentence of death. Id.

It is in the light of federal precedent that this Court must view Virginia's attempt to define its "vileness" aggravating factor. In Smith v. Commonwealth, the Supreme Court of Virginia construed "the words 'depravity of mind' as used [in capital sentencing] to mean a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." 219 Va. 455, 248 S.E.2d 135, 149 (1978). It then construed "aggravated battery" to mean "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." Id. These purported definitions given to "depravity of mind" and "aggravated battery" by the Virginia Supreme Court are themselves devoid of meaning.[5]

[5]"Torture" as an element of Virginia's "vileness" factor is also constitutionally infirm. The Virginia Supreme Court has not attempted to define the term, nor does any definition of it appear in the state's model jury instructions. Va. Model Jury Instruction Nos. 33.122, 33.125. What conduct constitutes "torture" is an individualized subjective determination as is the determination of what conduct is "cruel." In Shell, 498 U.S. at 1, the Supreme Court found constitutionally wanting Mississippi's limiting construction of the word "cruel" -- "designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others." Because the term "torture" is subject to varying interpretation, and because, in its application by Virginia, it is

not given meaningful content, Virginia's use of "torture" as an element of the "vileness" aggravating factor leaves a sentencing jury with unbridled discretion to inflict the death penalty in an arbitrary fashion. Accordingly, the federal constitution prohibits the imposition of the death penalty, as must the state constitution, based upon any "vileness" factor that includes "torture."

(a) Virginia's construction of "depravity of mind" is meaningless.

The definition of "depravity of mind" is incomprehensible. The words "moral turpitude and psychical debasement," supplied by Smith, are no more informative than the unconstitutionally vague terms of "outrageously or wantonly vile," "especially heinous, atrocious or cruel," or "extremely wicked or shockingly evil," found lacking in Godfrey, 446 U.S. at 429; Maynard, 486 U.S at 363; Shell 498 U.S. at 2 (Marshall J., concurring). Accordingly, any limiting instruction using them is unconstitutionally vague. Shell, 498 U. S. at 2 (Marshall J., concurring).[6]

Moreover, the Virginia Supreme Court's definition of "depravity of mind" also requires the sentencing jury to make legal determinations, which it is incompetent to do. First, in its definition of "depravity of mind," the Supreme Court refers to "the definition of ordinary legal malice and premeditation." Va. Code. Sections 19.264.2 and 19.264.4(C). However, neither the definition of legal malice nor of premeditation is self-explanatory, leaving a sentencing jury to arrive at its own peculiar and uninformed understanding of these complex legal terms of art. Second, the Virginia Supreme Court's definition of "depravity of mind" requires the jury to determine both the "degree" of "moral turpitude" and "psychical debasement" (1) present in the capital felony and (2) "inherent" in the unexplained definitions of "legal malice" and "premeditation." Third, the jury must evaluate these vacuous determinations without regard to any standard. None of these demands of the Virginia Supreme Court's definition of "depravity of mind" may be understood, much less accomplished by a jury. For each of these reasons as well, the Virginia Supreme Court's definition

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[6] The same reasoning would apply to an instruction referring either to "moral turpitude" or to "psychical debasement," but not to both.

of "depravity of mind" is unconstitutionally vague.

In this regard, the definition of "depravity of mind" announced by the Virginia Supreme Court bears no resemblance to the definition of "depraved" murder validated by the U.S. Supreme Court in Walton, 497 U.S. at 654. The Arizona Supreme Court defined a "depraved" murder as a murder in which "the perpetrator relishes the murder, evidencing debasement or perversion." Id. at 655. In this regard, it found that a murder would be "depraved" were the murderer to "show[] an indifference to the suffering of the victim and evidence[] a sense of pleasure in the killing." Id. at 655. Nowhere in Arizona's definition of "depraved" is there any reference to any legal definition as is the case with Virginia's definition of "depravity of mind." Nor is there any requirement in Arizona that the sentencer compare the case before it with other circumstances, as is true in Virginia, to determine whether, in relative terms, the murder was conducted in a "depraved" manner. Furthermore, and very important to the decision of the Supreme Court in Walton, a judge rather than a jury was the sentencer. Unlike a jury, a judge may be presumed to understand the nuances of the law. Id. at 655.

(b) Virginia's construction of "aggravated battery" is meaningless.

As previously stated, the Virginia Supreme Court has defined "aggravated battery" as a "battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." Smith, 219 Va. at 478, 248 S.E. 2d at 149. Necessary to this definition is a comparative evaluation of the murder committed by the defendant and other murders in a context in which there is no standard unit of measure and for which jurors, in their limited capacity, are unprepared. "The minimum necessary to accomplish an act of murder" alone is not itself a viable standard because it erroneously presupposes uniform understanding of what is medically and legally the minimum necessary to accomplish murder. Because the limiting

construction provides no standard by which jurors can measure culpability, they are left to flounder upon the vagaries of each juror's own best guess. Inasmuch as the definition of aggravated battery fails to provide meaningful guidance to the sentencing jury, it too must be declared unconstitutionally vague.[7]

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[7]Because Virginia's definition of "aggravated battery" and "depravity of mind" each depend on legal terminology and require comparisons between the case at issue and the unknown, they exacerbate rather than remedy the vagueness of the statutory language setting forth the "vileness" aggravating factor. Accordingly, they may not be used in instructions because they will confuse the jury. H.W. Miller Trucking v. Flood, 203 Va. 934, 128 S.E. 2d 437, 439 (1962).

An additional reason to declare unconstitutional Virginia's "aggravated battery" would exist if the Court relied upon the definition of "aggravated battery recently employed by

the Fourth Circuit." In Boggs v. Bair, the Fourth Circuit affirmed a death sentence in Virginia by interpreting Virginia Code Section 19.2-264.2 to permit a finding of "aggravated battery" upon a showing that a murder was "qualitatively or quantitatively " different from other murders. 892 F.2d 1193 (1989), cert. denied, 475 U.S. 1031, (1990) (emphasis added); cf. Stout v. Commonwealth, 237 Va. 126, 132-33, 376 S.E. 2d 288, 291-292 (1989) (holding that single knife wound qualifies as an aggravated battery). By contrast, Smith requires that a murder be both quantitatively and qualitatively different from other murders to satisfy the aggravated factor of "aggravated battery." See, e.g., Smith, 219 Va. 455, 248 S.E.2d at 149; Barnes v. Commonwealth, 234 Va. 130, 360 S.E.2d 196 (1987). Accordingly, Boggs is a dramatically less exacting standard than Smith. Because the use of the Boggs definition would permit death to be imposed in a case in which the Smith definition would not, their simultaneous application to capital defendants in Virginia is unconstitutional. For the same reason, the varying legal standard as to what constitutes "aggravated battery' violates the equal protection clauses of both the federal and state constitutions. Moreover, use of inconsistent definitions for the same aggravating factor would disable the Virginia Supreme Court from properly conducting the proportionality review required by Va. Code Ann. § 17.1-313). Obviously, cases may not be compared for disparate results under analogous facts where varying legal standards are employed.

(c) Virginia's vileness factor, as applied, unconstitutionally denies Defendant notice and a meaningful opportunity to be heard.

The Sixth and Fourteenth Amendments to the United States Constitution entitle a defendant to be informed of the nature and cause of the accusation against him. Rose v. United States, 161 U.S. 29 (1896); Goss v. Lopez, 419 U.S. 565, 579 (1975); Mullane v. Central Hanover Trust, 339 U.S. 306, 313 (1950). Virginia law also requires that the state explain in plain and unequivocal terms the offense of which a defendant is accused. Riner v. Commonwealth, 145 Va. 901, 907, 134 S.E. 542 (1926). Because a penalty of death is absolute and unique, both federal and state law provide a defendant accused of capital murder with a heightened need for adequate notice and a fair opportunity to be heard on any matter at issue, during any phase of the prosecution. Lankford v. Idaho, 500 U.S. 110 , 127 (1991); Lockett, 438 U.S. at 604; Woodson, 428 U.S. at 305.

In Lankford, the Supreme Court reiterated that the sentencing phase of a capital murder trial "is sufficiently like a trial in its adversarial format and in the existence of standards for decision" that defense counsel's role is "to ensure that the adversarial testing process works to produce a just result under the standards governing decision." 500 U.S. at 127. Defense counsel is necessarily disabled from performing this vital role to ensure justice where, as here, the standards for decision are not available to the defense. Such standards are not available here, because, without further definition, the vileness factor set forth in Virginia Code Sections 19.264.2 and 19.264.4(C) is meaningless. See Part III, supra.

The Commonwealth has not committed to any limiting construction of the vileness

factor. The Virginia Supreme Court has said that the definitions promulgated by the Smith court are not "the best or the only ones." Clark, 220 Va. at 211, 257 S.E.2d at 790. Therefore, Virginia trial courts are free, under current Virginia law, to define the statutory terms in new and different ways, as long as those definitions are not inconsistent with the Smith definitions.

Because the defendant is not eligible for the death penalty absent a finding of vileness or future dangerousness, whichever of these aggravators the Commonwealth relies upon becomes an element of its case for the death penalty. The defendant simply cannot prepare or execute a defense against the Commonwealth's charges when elements of the offense are not revealed to him. In the process described by the Lankford court as "adversarial" and governed by "standards of decision," the vileness factor, undefined and ambiguous, represents a point of breakdown at which the adversarial testing process gives way to the arbitrary pronouncements of the court and the passions of a jury. Where the constitution demands clarity and guidance, there are only the whims of the court and jury.

Defendant's federal and state constitutional rights will be violated if he is not provided with notice before trial, and an opportunity to be heard during trial, regarding any definition of any aspect of the vileness aggravating factor to be used against him. In the absence of a constitutionally permissible construction that clearly and unambiguously defines vileness, the defendant cannot be assured that even proper notice of one version of vileness will apprise him of the **only** version against which he will have to defend. Not only must he be assured of notice of all the elements of the case against him, but that such notice describes the **only** elements of the case against him. Indeed, in Simmons v. South Carolina, 512 U.S. 154, (1994), the Supreme Court held that the defendant's due process rights were violated by the trial court's failure to define the vague

term "life imprisonment." The Court reaffirmed that the due process clause forbids the execution of a person "on the basis of information he had no opportunity to deny or explain." Simmons, 512 U. S. at 161 (citation omitted). Because the vileness factor is susceptible to many interpretations and definitions, a defendant cannot know which definition will be applied by a court, a jury, or the prosecution in his case, and therefore has no notice of or opportunity to defend against the version of vileness conjured in his trial.

In sum, the vileness predicate in Virginia is unconstitutional both facially and as applied by Virginia. The burden is on the Commonwealth to define its aggravating factors in a constitutionally sufficient way. Godfrey, 446 U.S. at 428. The Commonwealth has not produced a definition of the vileness factor that passes constitutional muster. Therefore, that factor may not constitutionally be considered by any jury empaneled to sentence defendant.

B. The Vileness Factor Set Forth in Virginia Code Sections 19.2-264.2 and 19.,2-264.4(C) is Unconstitutionally Implemented

1. The Penalty Phase of a Capital Trial is Procedurally Indistinguishable from the Guilt/Innocence Phase of a Felony Trial.

United States Supreme Court has held that, for purposes of constitutional analysis, the penalty phase of a capital murder trial is equivalent to the guilt/innocence phase of a felony trial. Lankford v. Idaho, 500 U.S.110 (1991).

For example, the guilt/innocence phase of a felony trial the prosecution must prove beyond a reasonable doubt, and the jury must unanimously find, each of the elements of the charged offense. If the proof fails, so that the defendant is convicted of a lesser offense, the defendant

cannot be retried for the original offense; he has been impliedly acquitted of it. See Green v. United States, 355 U.S. 184 (1957) (conviction of the lesser included offense of second degree murder acts as an implied acquittal of the charge of first degree murder); Price v. Georgia, 398 U.S. 323 (1970) (similar).

In Bullington v. Missouri, 451 U.S. 430 (1981), the defendant was convicted of capital murder, but at the penalty phase of the trial the jury recommended a life sentence. After the conviction was reversed on appeal, that state proposed to retry the case as a capital case in which the death penalty was available. The Supreme Court held that the defendant had been "impliedly acquitted" of the death sentence by the first jury and, hence, could not again be subjected to a proceeding that might impose a death sentence. This holding is specifically based on the Supreme Court's understanding that, for constitutional purposes, the penalty phase of a capital trial is procedurally indistinguishable from the guilt/innocence phase of a felony case. Id., at 438.

2. A Jury must be unanimous as to the Element(s) of a Crime in order to Convict.

In Richardson v. United States, 526 U.S. 813 (1999), the defendant was convicted of engaging in continuing criminal enterprise (CCE). The statute requires, inter alia, proof that the defendant committed a specified violation and "such violation is a part of a continuing series of violations" 21 U.S.C. § 848(c). At trial, the judge instructed the jury "that [to find a series] it 'must unanimously agree that the defendant committed at least three federal narcotics offenses,' while adding, 'you do not . . . have to agree as to the particular three or more federal narcotics offenses committed by the defendant'" Id. at 816. The defendant appealed his conviction, arguing that the jury must unanimously agree on which specific acts constituted the series of violations. The United

States Supreme Court held that as a matter of federal statutory construction certain underlying elements of a crime are so important to an ultimate guilt finding that the jury must be unanimous as to these elements. Id., at 824.

A jury does not need unanimously to find "which of several possible sets of underlying brute facts make up a particular element." Id., at 817. The Court provides an example of the distinction between underlying facts and elements of a crime: an element of robbery is force or threat of force and it is enough that the jury finds a threat of force, even if some of the jurors believe the threat was created by a gun while others believe the threat was created by a knife. The means used in achieving the element, a gun or a knife, is not a statutory element of robbery and therefore would not need to be determined unanimously by the jury. Id.

While a robbery case will not require a specific finding that the use of a knife or a gun proves the element "threat of force," the CCE statute clearly states the requirement that there be a "series of violations." The United States Supreme Court held that such language within a statute "create[s] several elements, namely the several 'violations' in respect to each of which the jury must agree unanimously and separately." Id., at 817. This holding is "consistent with a tradition of requiring juror unanimity where the issue is whether a defendant has engaged in conduct that violates the law." Id., at 819.

Similar in specificity to the federal CCE statute, the Virginia capital murder statute clearly notes that one or more of torture, depravity of mind, or aggravated battery, must be found by the jury in order to find vileness, thereby creating eligibility for a death sentence. Va. Code Ann. § 19.2-264.2. Section 19.2-264.2 specifically makes these three forms of conduct, which provide the evidence and proof of vileness, separate elements requiring jury unanimity. To return to a previous

example, a jury need not be unanimous regarding whether a gun or knife created the threat of force, a robbery statute requires only the existence of such a threat. A jury must unanimously find the existence of such a threat, in addition to other elements, in order to convict the defendant of robbery. Likewise, a jury need not be unanimous that torture was by cigarette burns or electric shocks, but must be unanimous that there was torture, one of three possible elements of the vileness aggravating factor. Va. Code Ann. § 19.2-264.2.

Further, the three forms of conduct, torture -- depravity of mind, and aggravated battery -- specified in the statute, are no mere means to a finding of vileness. The three forms of conduct represent different kinds of behavior. To allow a jury to gloss over these differences, thereby "permitting a jury to avoid discussion of the specific factual details . . ., will cover-up wide disagreement among the jurors about just what the defendant did, or did not, do." Richardson, at 819. To continue a prior example, one juror may find the element torture due to the presence of cigarette burns while another juror may not believe that the defendant inflicted the burns, but rather that the Commonwealth proved aggravated battery. Both jurors find vileness, but the requirement of proof that is the backbone of our criminal law system has been circumvented. This process would too easily allow jurors to make a general conclusion in instances where they should be required to focus on specific factual detail, the burden of proof for which rests on the Commonwealth. This level of ambiguity should not be allowed to exist in a criminal trial, much less a capital murder trial, especially since United States Supreme Court precedent requires a heightened standard of reliability in capital cases. Woodson v. North Carolina, 428 U.S. 280 (1976).

In identifying several of the issues which led to the requirement that important elements be identified and unanimously found by a jury in order to reach a conviction, the Court

framed its decisions as a matter of statutory construction in order to avoid serious constitutional questions. Justice Breyer, joined by Chief Justice Rehnquist, Justices Scalia, Souter, Stevens and Thomas, held that "the Constitution itself limits a state's power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition." Richardson, at 820. Had the Court not been able to base its decision on the Congressional wording of a federal statute, it would have been required to rely on a constitutional basis for its decision requiring jury unanimity for all important subelements of a crime.

In effect, the Supreme Court engaged in construction of the CCE statute to avoid serious constitutional problems. Three constitutional issues exist which impact a defendant's rights when the question of jury unanimity, as to elements of a crime, arises. First, a defendant's Sixth and Fourteenth Amendment rights to a jury trial would be jeopardized if a jury was not required unanimously to find all elements of a crime before convicting the defendant. The jury's function is to decide all questions of fact required to determine guilt/innocence or death/life during a trial. Elements of a crime are the very matters requiring jury unanimity. Failure to comply with this historic and traditional trial requirement would deny a defendant his Sixth and Fourteenth Amendment constitutional rights to a jury trial.

Second, a defendant's Sixth and Fourteenth Amendment rights to effective assistance of counsel would be violated should a jury not be required to unanimously find which specific elements of a crime would satisfy a conviction. Defense counsel would not be able to direct her resources to the Commonwealth's case under these conditions because the Commonwealth, and in turn the jury, could be vague as to which of several specific elements were presented and proved

under a regime where a jury was only required to be unanimous as to the crime or sentence and not unanimous as to the underlying elements of the crime or sentence. Such a regime would render counsel ineffective die to counsel's inability to direct her resources at rebuttal of a specific group of crime or sentence elements.

Third, a defendant's Fourteenth Amendment right to due process would be violated if a jury were permitted to convict or sentence a defendant without a unanimous finding of all elements of that crime or sentence. A defendant has a constitutional right to know for what crime he is being convicted and for what statutorily provided sentence of death he is being condemned. Without jury unanimity as to the elements of a crime or sentence, a defendant cannot be provided with the basis for that guilty verdict of death sentence. Without this fundamental knowledge, a defendant's constitutionally based due process right will be violated.

While the Court based its decision in Richardson on the construction of a federal statute, it did so because failure to construe the statute as it did would have created serious constitutional questions. As noted earlier, Woodson, supra, constitutionally requires a heightened standard of reliability in capital cases. In order to preserve the rights of capital defendants, Richardson must be understood constitutionally to require that the jury unanimously find each element of both the crime charged and death penalty predicates.

3. Unanimity as to Torture, Depravity of Mind, or Aggravated Battery is Constitutionally Required.

A number of Virginia cases have held that the jury must be unanimous as to the penalty of death and that unanimity as to the elements of future dangerousness or vileness is not necessary. Briley v. Bass, 584 F. Supp. 807, 819 (E.D. Va. 1984). However, a series of strong

dissents has created doubt about the rule that unanimity as to the aggravating factors is unnecessary. For example, in Quintana v. Commonwealth, 224 Va. 127, 295 S.E.2d.643 (1982), Justice Poff of the Supreme Court of Virginia, concurring in part and dissenting in part, asserted:

> The jury's verdict stated the two death penalty predicates in the alternative. No one can tell whether the jury found both predicates or only one, and if only one, which one. Indeed, it is possible that some jurors found only the dangerousness predicate and other jurors only the vileness predicate, while other jurors found both. Even if a plurality or a majority of the jurors agreed upon one or both of the death penalty predicates, the verdict is not constitutionally sufficient.

Id. at 154, 295 S.E.2d at 657. The Virginia Model Jury Instructions, responding to the logic of the Poff dissent, also requires a unanimous jury verdict on each aggravator upon which the jury relies to support the imposition of the death penalty. Virginia Model Jury Instructions No. §33.130. Moreover, Richardson v. United States, 526 U.S. 813 (1999), holds that to convict a defendant of continuing criminal enterprise, the jury must unanimously agree not only that the defendant committed some "continuing series of violations," but that the jury must also unanimously agree about which specific "violations" make up that "continuing series." Given this holding, if it does nothing else, Richardson clearly mandates the need for jury unanimity as to the aggravating factor(s) upon which the determination of death as the appropriate penalty is based.

In fact, however, Richardson does even more than this. Not only does it demonstrate the need for jury unanimity as to the aggravating factors of vileness and/or future dangerousness, but it also establishes a one-for-one equivalence between 21 U.S.C. §848 "continuing series of violations" and Virginia Code section 19.2-264.2 "vileness." It thereby mandates unanimity as to the elements of vileness - - torture, depravity of mind or aggravated battery - - upon which the jury relies

in order to support the finding of vileness. Just as the jury in Richardson must agree about which specific violations make up the series to convict a defendant of continuing criminal enterprise, so too must the jury in the sentencing phase of a capital murder trial agree about the element(s) that constitute vileness in order to fix the defendant's punishment at death.

There is no meaningful analytical distinction between Richardson and a case involving Virginia Code section 19.2-264.2. The only factual distinction is that Richardson is concerned with the guilt/innocence phase of a trial whereas 19.2-264.2 involves the penalty phase. This distinction was rendered meaningless by the equation of a capital sentencing proceeding with the trial on the question of guilt or innocence in Lankford v. Idaho, 500 U.S. 110 (1991), and Bullington v. Missouri, 451 U.S. 430 (1981). Although Virginia cases such as Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), specifically state that a jury need not specify which element (torture, depravity of mind or aggravated battery) of the vileness factor it finds in order to be unanimous and recommend death, Richardson clearly destroys the vitality of those holdings. According to the logic set forth in Richardson, torture, depravity of mind or aggravated battery define the specific conduct in which the defendant has engaged. The requirement that the jury be unanimous as to any of the three elements it uses to support its finding of vileness forces jurors to consider the factual details of each element and thus prohibits the jury from simply concluding "that where there is smoke, there is fire." Richardson 526 U.S. at 819.

4. The Commonwealth must prove vileness factors beyond a Reasonable Doubt.

The underlying rationale of Richardson has been extended into the sentencing context by Jones V. United States, 526 U.S. 227 (1999), and Apprendi v. New Jersey, 530 U.S. 466, (2000).

Those cases specifically concern sentence enhancing factors which were adjudicated by the judge at sentencing by the preponderance of evidence standard. The holdings of Jones and Apprendi are summed up in this statement:

> it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.

Apprendi at 490 (quoting Jones, 526 U.S. at 252-53).

While Apprendi also says that judicial determination of aggravating factors is constitutionally acceptable in capital cases that portion of the opinion refers only to the identity of the fact finder. It does not refer to the Commonwealth's burden of persuasion.

The combined effect of Lankford, Bullington, Richardson, Jones and Apprendi is to require that sentencing factors be proven beyond a reasonable doubt. Because the Virginia scheme does not require the Commonwealth to prove at least one of the vileness factors -- torture, aggravated battery, or depravity -- beyond a reasonable doubt, application of that scheme to Defendant will deprive him of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

B. The Future Dangerousness Aggravating Factor Is Unconstitutionally Vague.

Virginia Code Section 19.2-264.4(C) and the Virginia Model Jury Instructions provide that a person shall not be sentenced to death unless the Commonwealth proves beyond a reasonable doubt that there is a "probability that he would commit criminal acts of violence that

would constitute a continuing serious threat to society. . . ." Va. Model Jury Instruction Nos. 33.122, 33.125. The Code states that

> [t]he penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society . . . .

Va. Code Ann. 19.2-264.4(C).

This wording, "probability beyond a reasonable doubt," "is and can be only puzzling -- even mind-boggling -- to a jury or to anybody." C. Black, Due Process for Death: Jurek v. Texas and Companion Cases, 26 Cath. U.L. Rev. 1, 4 (1976); but see Smith, 219 Va. 455, 248 S.E.2d 135, 148 (holding that there is "no constitutional vagueness in that language.").

Once again, in Godfrey v. Georgia, the United States Supreme Court held that

> if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion" . . . It must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death."

446 U.S. at 428 (citations omitted). In no way does the Virginia future dangerousness aggravator satisfy this mandate. Rather, it is the embodiment of "standardless discretion," the antithesis of "clear and objective standards," and provides absolutely no guidance whatsoever to a sentencer. The Godfrey Court's assessment of Georgia's vileness factor describes perfectly Virginia's future dangerousness aggravator. "There is nothing in these few words, standing alone, that implies any

inherent restraint on the arbitrary and capricious infliction of the death sentence." Id. Furthermore, Virginia offers no narrowing construction of the future dangerousness aggravator; it therefore must be assessed on its face. It is comprised of ambiguous, undefined terms, each of which fails a test for vagueness.

1. The "future dangerousness" aggravator is unconstitutionally vague.

The Godfrey Court wrote that "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile. . . .'" 446 U.S. at 428-29. In exactly the same manner, under the future dangerousness aggravator a person of ordinary sensibility could fairly find for every murderer a "probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society." It invites the finding that any murderer is likely to kill again. As in Godfrey, in any given case "[s]uch a view may, in fact, have been the one to which the member of the jury . . . subscribed." Id, at 429.

The future dangerousness aggravator asks a jury to find that the Commonwealth has proved a "probability" "beyond a reasonable doubt." Va. Code Ann. 19.2-264.4(C). The word "probability" is ambiguous. In mathematical usage, it means any chance that some event will occur. C. Black, 26 Cath. U.L. Rev. at 4. In more common usage, it may mean more than a fifty-percent chance. Id. at 5. It may mean "high likelihood." Id. Certainly, there are as many definitions of "probability" as there are jurors. In any event, the jury instructions and Virginia's statutory provisions do not inform the jury as to which sense of "probability" is being used.

The words "beyond a reasonable doubt" in reality express a measure of probability. When a jury finds a defendant guilty "beyond a reasonable doubt," what they are saying is, "We do

not have any reasonable doubt as to the defendant's guilt, although we can never be one hundred percent sure." In other words, the jury is reporting a very high likelihood that the defendant is guilty. Asking that same jury to find a probability beyond a reasonable doubt can only confuse the jury. A jury faced with the instruction, "If you find a high probability that there is a probability that the defendant will be dangerous in the future. . . ." would not know what to do. But this is exactly what juries in Virginia are presently asked to do.

Instructing the jury to find something to be "beyond a reasonable doubt more likely than not" is an extremely confusing and vague command that can result in arbitrary imposition of the death penalty. The problem is exacerbated by the fact that the statutory verdict form given to the jury does not even contain the words "beyond a reasonable doubt." Va. Code Ann. § 19.2-264.4(D). Rather, the codified form only uses the word "probability." Id. Thus, there is a substantial risk that the already confused jury will not use the proper standard of proof, but will instead find only a probability of future dangerousness to impose the death penalty.

The phrase "criminal acts of violence" suggests no degree of criminality or violence. There is no indication whether such acts include misdemeanor assaults or are limited to homicides. Such criminal acts of violence may be interpreted by some jurors to include acts of violence against property. See, e.g., Va. Code Ann. § 17.1-805(C), which makes a violation of § 18.2-92 (breaking and entering with intent to commit a misdemeanor) into a "violent felony offense." The definition of this crucial part of the aggravator is left entirely up to the arbitrary judgment and caprice of individual jurors, and the standard by which the defendant's fate is to be determined is subject not to the rule of law, but to the luck of the jury commissioners' draw.

Similarly, the phrase "continuing serious threat to society" is undefined and

susceptible to multiple interpretations. Does "continuing" mean that the individual will be a threat to commit many violent acts throughout the future, or that he represents a threat to commit one violent act, and that threat will continue throughout the future without diminishing? The term "serious" is defined as "giving cause for concern." Webster's New World Dictionary 1225 (3d Ed. 1988). It is also defined as "requiring careful consideration; important." Webster's New World Dictionary, Revised (6th Ed. 1984). It cannot be determined what these definitions mean to individual jurors, or what any other definition a juror might apply may mean. A person of ordinary sensibility may consider a convicted defendant in prison for life with no opportunity for parole to be less than "cause for concern" for society. Or, he may consider every defendant convicted of a murder as a cause for continuing "careful consideration." Presumably, defendants would not be eligible for a sentence of death under this factor if a history of misdemeanor assaults convinced the jury that the defendant would pose only an intermittent or minor threat to whatever group jurors determined to comprise the relevant society. Certainly jurors are given no direction in applying the language, and defendants no notice of what the terms mean.

The "society" that goes undefined in the statutory language may be defined by jurors to include themselves and their neighbors; however, defendants convicted of offenses committed after January 1, 1995, are not eligible for parole and will by virtue of their conviction of capital murder never be in contact with that "society." Va. Code Ann. § 53.1-40.1, 53.1-165.1. "Society," as interpreted by jurors, may refer to the prison community, the county, city, state, or nation. All that is certain is that the jury is given the power to arbitrarily define the term.

2. The future dangerousness aggravator is vague as applied.

The Supreme Court of Virginia has made absolutely no effort to confine the reach of

the future dangerousness factor. In Walton v. Arizona, 497 U. S. 639, 653 (1990), the Supreme Court held that

> [w]hen a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face.

It is therefore necessary to clarify the vague language of the future dangerousness aggravator. Juries in Virginia, however, are not provided with any narrowing construction of future dangerousness.

Some of the terms in the statute have been "defined." In Mickens v. Commonwealth, 247 Va. 395,403, 442 S.E.2d 678, 684 (1994), the Supreme Court of Virginia noted that it had previously defined "probability" as "'a reasonable "probability," i.e., a likelihood substantially greater than a mere possibility.'" Id. at 403. The efficacy of such a "definition" is debatable, but since the court does not require that juries be instructed on the construction, the question is moot.

Just as the language is unenclosed, so the application of this aggravator has been unfettered. The Supreme Court of Virginia has held that one with absolutely no past history of violence can be sentenced to death based on the future dangerousness factor because of the manner in which the capital offense is committed. Murphy v. Commonwealth, 246 Va. 136, 144-45, 431 S.E.2d 48, 53 (1993). The court allows juries to consider wholly irrelevant evidence offered to support the existence of the factor, such as evidence of a bigamous marriage and possession of stolen property. King v. Commonwealth, 243 Va. 353, 416 S.E.2d 669 (1992). See also, Quesinberry v. Commonwealth, 241 Va. 364, 402 S.E.2d 218 (1991)(evidence of drug use supports future dangerousness); Strickler v. Commonwealth, 241 Va. 482, 404 S.E.2d 227 (1991)(evidence of

tampering with a vending machine and counterfeiting supports future dangerousness). Truly, every conceivable murderer could be made to fit within the alleged parameters of the future dangerousness aggravator, if not by virtue of having broken into a vending machine as a child, then because of the "unique" circumstance of having left a "messy" crime scene.

The reach of future dangerousness has no limitations. The aggravator as written and applied is nothing more than an unfocused appeal to a jury's fear, and thus facilitates the arbitrary and capricious application of the death penalty in Virginia. Accordingly, the future dangerousness aggravating factor is unconstitutionally vague, both on its face and as applied. See, e.g., Furman, 408 U.S. at 313 (White concurring); Gregg, 428 U.S. at 183 (1976); Godfrey, 446 U.S. at 428. It therefore may not be relied upon by any jury sentencing Defendant in this case.

II. VIRGINIA IMPOSES UNCONSTITUTIONAL BARRIERS TO THE JURY'S CONSIDERATION OF MITIGATION EVIDENCE.

Virginia does not require instruction to the jury regarding (a) the duty of the jury to consider mitigating evidence; (b) the meaning of evidence in mitigation; (c) the absence of any burden of proof on the defendant regarding mitigation evidence presented, or (d) the liberty that each juror has to consider and give effect to such mitigating evidence. The absence of jury instructions on each of these critical aspects of mitigating evidence violates the Eighth and Fourteenth amendments to the U.S. Constitution and Article I, Sections 9 and 11 of the Virginia Constitution.[8]

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[8] In Gregg v. Georgia, 428 U.S. 191, 192, the Supreme Court emphasized the importance of thorough jury instruction, especially in death penalty cases:

> Since the members of a jury will have little, if any,

A. U.S. Supreme Court Precedent Requires Jury Instruction To Permit A Jury To Give Effect To Mitigation Evidence.

That a jury "sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence is ... well established." Mills v. Maryland, 486 U.S. 367, 374-75 (1988) (emphasis in original) (internal quotations omitted). Accordingly state procedures are

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> previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given.
>
> . . .
>
> The idea that a jury should be given guidance in its decision making is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. . . . It is quite simply the hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

unconstitutional if they hinder the jury's ability to consider or give effect to any mitigating evidence. Penry v. Lynaugh, 492 U.S. 302, 321 (1989). Under United States Supreme Court precedent, whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute by the sentencing court or by an evidentiary ruling is not controlling. Mills, 486 U.S. at 375.

To permit a juror to give full effect to any evidence in mitigation, the federal constitution precludes a state from allowing a jury to restrict its consideration of mitigation evidence to that evidence upon which jurors agree constitutes evidence relevant to leniency. In Mills, the Supreme Court reversed a sentence of death because the jury instructions and verdict form suggested that the jury must be unanimous as to the mitigation factors that it considered. Id. at 374. These state procedures were unconstitutional because they created a "substantial probability that reasonable jurors . . . well may have thought they were precluded from considering any mitigation evidence unless all 12 jurors agreed on the existence of a particular such circumstance." Id. at 384. The Court declared "that reasonable men might derive a meaning from the instructions given other than the proper meaning . . . is probable. In death cases doubts such as those presented here should be resolved in favor of the accused." Id. at 377.

Relying on Mills, in McKoy v. North Carolina, 494 U.S. 433, (1990), the Supreme Court struck down a death penalty statute that required unanimity among jurors as to mitigating factors. It did so because such a procedure "allows one holdout juror to prevent the others from giving effect to evidence that they believe calls for a sentence less than death." Id. at 439 (internal quotations omitted) (emphasis added).

In Lockett, the Supreme Court invalidated Ohio's death penalty statute that restricted jury consideration to only certain mitigating factors. The Court held that

> the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. (emphasis in original) The Court stressed the importance of each juror's consideration of all mitigation evidence to the ability of each juror to give weight to such evidence. It declared that

> a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Id. at 605. The Supreme Court has reiterated time and again that a state must inform the jury that it must consider and give effect to any mitigating evidence. See, e.g., Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (reversal of death sentence because jury was not permitted to consider defendant's troubled childhood and emotional disturbance); Skipper v. South Carolina, 476 U.S. 1 (1986) (reversal of death sentence because jury prevented from considering defendant's satisfactory adjustment to prison life).

B. Application Of Federal Precedent To Virginia's Silence Regarding Mitigation Evidence Renders Virginia's Death Penalty Unconstitutional.

Virginia fails to provide any instruction on mitigation evidence to a jury in a capital case. Four of the constitutional violations caused by Virginia's failure to so instruct the jury are discussed below.

1. Virginia fails to instruct a jury how evidence relevant to mitigation must be considered.

Virginia does not instruct a jury in a death penalty case that it must consider and give effect to any evidence relevant to mitigation. Section 19.2-264.4(B) illustrates, in a non-exclusive way, types of evidence that may be considered by a jury in mitigation. The Model Jury Instruction informs the jury that it should consider mitigating evidence, but does not incorporate these statutory examples of mitigation evidence. Nor does the Model Jury Instruction require each juror to consider mitigation evidence. Virginia Model Jury Instruction No. 33.127. Moreover, the Virginia Supreme Court has "repeatedly held [any instruction that addresses mitigation evidence] to be improper." See, e.g., Mackall v. Commonwealth, 236 Va. 240, 372 S.E.2d 759, 770 (1988), cert. denied, 492 U.S. 925 (1989).

The Fifth Circuit has grasped the importance of comprehensive mitigation instructions, and frames the issue well. In addressing the insufficiency of a Mississippi trial court's instructions neglecting mitigation, the court wrote that, "[o]nly an instruction form the trial court can invest a particular concept -- here the jury's ability to consider nonstatutory mitigation factors -- with the authority of the court." Washington v. Watkins, 655 F.2d 1346, 1375 (5th Cir. 1981).

In an earlier case, this same court explained exactly why Virginia's failure to instruct on mitigation is so egregious:

> [The] constitutional requirement to allow consideration of mitigating circumstances would have no importance, of course, if the sentencing jury is unaware of what it may consider in reaching its decision. We read Lockett . . ., then, to mandate that the judge clearly instruct the jury about mitigating circumstances and the option to recommend against death.

Chenault v. Stynchcombe, 581 F.2d 444, 448 (5th Cir. 1978). The court held that a failure to so instruct the jury is "[a] substantial denial of a federal constitutional right." Id. The failure of Virginia to inform the jury by instruction that it must give effect to any mitigation evidence violates the teachings of Mills, Lockett, and subsequent federal cases, and, therefore, is unconstitutional.

2. Virginia fails to inform a jury of the meaning of mitigation evidence.

The Virginia Supreme Court does not require that juries be instructed on the meaning of mitigation evidence. The inclusion of the examples of mitigating evidence in the Virginia Code evinces a legislative determination that such examples are valuable to the sentencer. Va. Code Section 19.264.4(B). An instruction could easily and unequivocally state that the factors enumerated are not exhaustive and serve only to provide the jury with examples of types of mitigating evidence. Inasmuch as there are no instructions to the jury to inform it of what mitigation evidence is, the reference to mitigation evidence in Virginia's verdict form is impotent. The reference does not begin to communicate to the jury that the law recognizes the existence of facts or circumstances surrounding the defendant which, though not excusing or justifying the act, nevertheless properly may be considered in determining whether to impose a death sentence.

Again, the Fifth Circuit provides a clear exposition of what Lockett and its progeny require:

> In most cases. . . the judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death; in order to do so, the judge will normally tell the jury what a mitigating circumstance is and what its function is in the jury's sentencing deliberations.

Spivey v. Zant, 661 F.2d 464, 471 (5th Cir. 1981). In contrast, Virginia chooses to leave to chance the jury's concept of mitigating circumstances, if it has any at all. This practice is at odds with the goal of carefully guided and focused consideration of the particularized circumstances of the individual offense and the individual offender.

3. Virginia fails to instruct a jury that there is no burden of proof regarding the existence of mitigation evidence or regarding whether mitigating circumstances equal or exceed any aggravating circumstance.

In refusing to permit any meaningful instruction regarding mitigating evidence, the Virginia Supreme Court has held that the trial court may not instruct the jury as to the burden of proof necessary to consider a mitigating factor. Mackall, 236 Va. 240, 372 S.E.2d 759 (1988), cert. denied, 492 U.S. 925 (1989). In this regard, the Supreme Court has repeatedly emphasized that any evidence that is relevant to mitigation must be considered by the jury. McKoy, 494 U.S. 433 (1990). (noting that evidence in mitigation need not excuse the defendant's conduct). The Supreme Court made clear that the jury need only view such evidence as tending to make leniency more appropriate than would be the case without such evidence. Id. at 441.

Accordingly, the defendant need not establish any mitigating circumstance by any standard of proof. To avoid the substantial risk that the jury will be confused by reference to the Commonwealth's burden of proof as to any aggravating factor, the Court must instruct the jury that the defendant is free of any burden of proof as to the existence of any mitigating circumstance and

as to whether mitigating circumstances are greater than or equal to aggravating circumstances. Because Virginia does not provide instruction to the jury that mitigation evidence need only be relevant, the Virginia death penalty statutes are unconstitutional as applied.[9]

4. Virginia fails to instruct a jury regarding individual juror assessment of mitigation evidence.

In addition, Virginia offers no guidance to the sentencing jury to allow each juror to assess mitigation evidence independently of the other jurors. Without such an instruction, each juror is left to conclude from the statutory verdict form, which requires a unanimous verdict, that the jury must agree on the basis for that verdict. See Va. Code Section 19.2-264.4(D). Accordingly, only one juror need object to consideration of a mitigating factor to keep it from being considered by the jury. This is constitutionally unacceptable. Mills, 486 U.S. at 374; McKoy, 494 U.S. at 433.

In sum, alone and together, each of the elements of Virginia's oversight of mitigation evidence in its instructions to sentencing juries in capital cases exposes Defendant to the substantial risk that he will be executed without regard to evidence that calls for a "sentence less than death."

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[9] In this regard, defendant challenges Virginia's death penalty statute as unconstitutionally vague because it does not address the burden of persuasion as to mitigation evidence, the standard of proof for carrying that burden of persuasion, or other issues regarding mitigation or the proper balance between aggravating and mitigation circumstances. See Spencer v. Commonwealth, 385 S.E.2d 850, 854 n.3 (1989); see, e.g., Furman v. Georgia, 408 U.S. 238, 313 (1972); Gregg v. Georgia, 428 U.S. 153, 189 (1976); Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

Eddings, 455 U.S. at 110. Accordingly, for these reasons as well, Virginia's death penalty statutes are unconstitutional.

C. The statutory verdict form and model jury instructions erect barriers to the consideration and use of evidence in mitigation and create a presumption in the mind of a reasonable juror that death is the appropriate sentence.

Virginia's practices of failing adequately to instruct the jury on mitigation, of using model jury instructions and verdict forms, results in an impermissible barrier to the sentencer's consideration of all mitigating evidence. Hitchcock v. Dugger, 481 U.S. 393, 389-99 (1987); Skipper v. South Carolina, 476 U.S. 1, 4 (1986); Lockett v. Ohio, 438 U.S. 536, 604 (1978). The Court has held repeatedly that it is irrelevant whether the barrier to the sentencer's consideration of mitigating evidence is interposed by statute, by the sentencing court or by an evidentiary ruling. Mills, 108 S. Ct. at 1866. In Mills, the Court held that "because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death penalty in plain violation of Lockett, it is our duty to remand this case for resentencing." Id. at 1866 (citing Eddings v. Oklahoma, 455 U.S. 104, 117 (1982)).

Virginia's practice of inadequate jury instructions and forms erects the same impermissible barrier to consideration of mitigating evidence as that condemned in Mills. The jury instructions do not adequately instruct the jury to consider all of the mitigating evidence. The jury is not told that each one of them may consider his or her own mitigating evidence, and the instructions do not tell the jury what mitigating evidence is. For these reasons, a reasonable juror could understand the instructions to mean that the consideration of mitigating evidence was not

necessary, or that any mitigating evidence that was to be considered would have to be found by all members of the jury to apply. The jury is also not told of the statutory mitigating factors, at the very least depriving jurors of the knowledge that the Virginia General Assembly has concluded that the jurors should possess. Thus, the model instructions leave open the possibility that the jury will consider one of the statutory mitigating factors to be evidence of one of the aggravating factors.

For the above reasons, the method in which Virginia courts instruct the jury is in violation of Defendant's Fourteenth Amendment rights to due process of law, the Defendant's Sixth Amendment rights to an impartial jury and to the effective assistance of counsel, and of the Defendant's Eighth Amendment right against the imposition of cruel and unusual punishment.

III. SECTION 19.2-264.4(C), WHICH ALLOWS THE SENTENCER TO FIND "FUTURE DANGEROUSNESS" BASED ON UNADJUDICATED CRIMINAL CONDUCT, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Supreme Court has not yet addressed whether a state may, consistent with the Eighth and Fourteenth Amendments to the U.S. Constitution, use evidence of unadjudicated criminal conduct to prove a statutory aggravating factor. See, e.g., Miranda v. California, 486 U.S. 1038 (1988)(Marshall, J., dissenting from denial of certiorari). Nor has it considered what standard of proof must be satisfied if introduction of the such evidence is constitutionally permissible.

Virginia Code Section 19.2-264.4(C), however, permits the introduction at the sentencing phase of a capital trial of evidence of the "past history" of the defendant to prove future dangerousness, and the Virginia Supreme Court has held that this statutory provision allows the introduction of evidence of unadjudicated criminal conduct. See, e.g., Gray v. Commonwealth, 233 Va. 313, 356 S.E.2d 157, cert. denied, 484 U.S. 873 (1987); Beaver v. Commonwealth, 232 Va. 521,

352 S.E.2d 342, 347 (1987), cert. denied, 483 U.S. 1033.

The Virginia statute on its face does not require that the prosecution prove that the defendant is, in fact, guilty of the unadjudicated crime beyond a reasonable doubt, or indeed by any standard of proof. The Virginia Supreme Court has not squarely addressed the question of whether the United States or Virginia Constitutions require that the prosecution satisfy the reasonable doubt standard of proof -- or indeed any lesser standard -- before such evidence may be used as a basis for imposition of the death penalty.[10]

For the reasons discussed below, defendant submits that the Virginia Supreme Court's decisions upholding the introduction of unadjudicated criminal conduct to prove the future dangerousness aggravating factor under any circumstances violates the Eighth and Fourteenth Amendments because it "fails to comport with the constitutional requirement of reliability" in capital sentencing mandated by Woodson v. North Carolina, 428 U.S. 280 (1976). See also Williams v. Lynaugh, 484 U.S. 935 (1987)(Marshall, J., dissenting from denial of certiorari). In addition, even if introduction of this evidence is constitutionally permissible, the United States and Virginia Constitutions require that it be admitted only if the prosecution satisfies the reasonable doubt

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[10]The Virginia Supreme Court expressly declined to address the issue in Watkins v. Commonwealth, 238 Va. 341, 351 n.5, 385 S.E.2d 50, 56 (1989), because the argument was not presented to the trial court. The Court in Stockton v. Commonwealth, 241 Va. 192, 402 S.E.2d 196 (1991) stated that the defendant raised the standard of proof issue and cites Beaver, 232 Va. 521, as standing for the proposition that such evidence is reliable. However, in Beaver, the Court did not address the standard of proof issue.

standard of proof.

A. The Introduction of Unadjudicated Criminal Conduct Is Unconstitutional Under Any Circumstances.

As noted, the Supreme Court has consistently emphasized that as a constitutional matter sentencing procedures "call[] for a greater degree of reliability where the death sentence is imposed." Lockett, 438 U.S. at 604. See Part I, supra. Some states have accordingly held that evidence of unadjudicated crimes is unreliable and accordingly inadmissible to prove a statutory aggravating factor in a capital sentencing trial. See Williams, 484 U.S. at 937 (citing cases).

As noted, the Virginia Supreme Court, reasoning that a "trier of fact called upon to decide whether or not to impose the death sentence is entitled to know as much relevant information about the defendant as possible," has rejected this line of authority. Beaver, 232 Va. at 529, 352 S.E.2d at 347; see also Stockton, 241 Va. 192, 402 S.E.2d 196 (1991).

This, as Justice Marshall has observed, does not satisfy constitutional standards:

> [T]he use of such evidence at sentencing is at tension with the fundamental principle that a person not be punished for a crime that the state has not shown he committed. In the context of capital sentencing, this tension becomes irreconcilable. This Court has repeatedly stressed that because the death penalty is qualitatively different from any other criminal punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate sentence."

Williams, 484 U.S. at 937-38 (citation omitted). Accordingly, defendant submits that the Virginia decisions upholding introduction of such evidence is unconstitutional and reserves his right to so argue should the Virginia law change or the United States Supreme Court decide the issue.

B. The Virginia Death Penalty Is Unconstitutional Because It Fails To Require That The State Satisfy Any Standard Of Proof Before It May Rely Upon Evidence Of Unadjudicated Conduct.

This same constitutional requirement of reliability at the very least mandates that the State be required to satisfy the reasonable doubt standard of proof before it may rely upon evidence of unadjudicated conduct.[11] The courts of two states have so held. State v. Lafferty, 749 P.2d 1239 (Utah 1988) (sentencer may not rely on unadjudicated conduct as aggravating factor unless it is first convinced beyond a reasonable doubt that the accused did commit the other crime); People v. Phillips, 41 Cal. 3d 29, 711 P.2d 423, 222 Cal. Rptr. 127, 149-50 (1985) (reversible error to allow jury to consider evidence of unadjudicated crimes unless given reasonable doubt instruction). Prior United States Supreme Court cases provide further support for this conclusion.

In In re Winship, 397 U.S. 358, 364 (1970), the Supreme Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." The Court stated that "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." Id. "No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them . . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." Id. at 363. The court went on to agree with

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[11] By so arguing, defendant does not intend to waive his objections to the introduction of this evidence under any circumstances.

the state court decision that, "a person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." 397 U.S. at 363 (citing In the Matter of Samuel W., 24 N.Y.2d 196, 205, 247 N.E.2d 253, 259 (1969)).

At least as high a level of reliability is necessary in a finding of death as the appropriate sentence as a finding of guilt in any ordinary offense. Caldwell v. Mississippi, 472 U.S. 320, 329 (1985); Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976). Furthermore, the process employed in arriving at that penalty is afforded the same weight and procedural protections as the process of determining guilt. The U.S. Supreme Court held in Bullington v. Missouri,451 U.S. 430 (1981), that in capital cases, the penalty phase of the trial must be treated the same way as the guilt phase of the trial for purposes of a defendant's Fifth Amendment protection against double jeopardy. In Strickland v. Washington, 466 U.S. 668 (1984), the Court extended that argument for the purposes of a defendant's Sixth Amendment right to counsel. The sentencing phase of the trial, and the elements of the "offense" it adjudicates (in this case, the "future dangerousness" aggravator),therefore demands the same degree of certainty that is demanded by the guilt phase and the offense it adjudicates. Thus, if a finding beyond a reasonable doubt of every fact necessary to constitute the crime charged is required for a criminal defendant to be punished in an ordinary case, then every fact necessary to sentence a capital murder defendant to death must also be found beyond a reasonable doubt. Cf., Apprendi v. New Jersey, 530 U.S. 466, (2000).

The admission of evidence of past unadjudicated acts results in a sentence of death based on facts that were necessary to its imposition but were not found beyond a reasonable doubt. The finding of future dangerousness can be made based solely or partially on unadjudicated acts of

the defendant. Va. Code Ann. § 19.2-264.4(C); Watkins v. Commonwealth, 229 Va. 469, 488, 331 S.E.2d 422, 436 (1985). If unadjudicated acts of the defendant are all that the Commonwealth offers in evidence, then those acts constitute the facts making up the entire necessary predicate to imposition of a death sentence. Even if the unadjudicated acts are not the sole evidence offered by the prosecution, they may still be relied upon in whole or in part by the sentencing jury. When a Virginia jury sentences a defendant to death based in any way on prior unadjudicated acts, it is doing so without finding "beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." In re Winship, 397 U.S. at 363. This violates the Eighth and Fourteenth Amendments to the United States Constitution, id. at 364, and the Virginia Constitution. Va. Const. Art. I, §§ 9, 11.[12]

C. The "Future Dangerousness" Aggravating Factor Is Inherently Unreliable And Is Insufficient To Guide Jury Discretion.

The United States Supreme Court held in 1983 that it was permissible for juries to predict the future dangerousness of a person. Barefoot v. Estelle, 463 U.S. 880, 896-903 (1983). As part of its rationale, the Court said that if such predictions were outlawed for purposes of capital murder sentencing, it would "call into question" other contexts in which future dangerousness is used, such as bail and parole determinations. Id. at 898. The Court also referred to expert testimony

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[12] At the very least, the constitution requires that Virginia satisfy some heightened standard of proof -- even if it is not beyond a reasonable doubt before it may rely on such evidence. See Louisiana v. Brooks, 541 So.2d 801 (1989) (clear and convincing evidence).

that successful predictions on future dangerousness could be made. Id. at 899 n.7.

Recent developments in constitutional law and empirical studies require reconsideration of the utility of lay predictions of "future dangerousness." Due process requires a greater degree of reliability in the determination that death is an appropriate punishment in a particular case. Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Under Woodson a determination that the defendant will be dangerous in the future should be more reliable than a similar finding made in other criminal contexts.

Bearing Woodson in mind, research conducted since Barefoot undermines the reliability of the decision's basic premise. Two social scientists have studied the records for former death-row prisoners released as a result of Furman v. Georgia. One of these studies was performed in Texas alone and one was nationwide. These state and national studies prove that predictions about future dangerousness are inherently unreliable. Marquart & Sorenson, International and Postrelease Behavior of Furman-Commuted Inmates in Texas, 26 Criminology 677 (1988) [hereinafter Marquart]; Marquart & Sorenson, A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders, 23 Loy. L.A.L. Rev. 5 (1989) [hereinafter Sorenson].

Marquart's Texas study examines the institutional and postrelease behavior of 47 inmates released as a result of Furman v. Georgia. Marquart, at 678. Prior to their release the prisoners were viewed as dangerous by prison officials and clinicians. Id. The Furman group was compared with a control group of prisoners who had been convicted of murder and rape, and who had received life sentences. Id. at 682. The study found that the former death-row prisoners were far less likely to commit "serious institutional rule infractions" and had only a slightly higher

recidivism rate if released, although the higher recidivism rate is probably due to a longer time out in the community. Id. at 685. Most importantly, only one of the 47 prisoners committed another homicide. Id. at 688. If predictions about dangerousness were to be believed, all 47 would have committed another homicide.

The national study has even more impressive results. That study followed 558 Furman-commuted prisoners in thirty states and the District of Columbia. Sorenson, at 7. The first observation in that study was that almost 75% of the death-row inmates at that time had no prior convictions for violent offenses. Id. at 14. "In short, the typical Furman-commutee was a southern male black murderer without a lengthy history of serious violence or repeated trips to prison." Id. at 15. Less than one third of former death-row inmates committed serious prison rule violations. Id. at 20. Of those, one half committed only one violation and another quarter only two. Id. "As a group, [the Furman-commuted inmates] were not a disproportionate threat to guards and other inmates." Id.

The Furman-commuted prisoners who were released from prison presented no disproportionate threat to society. "The released Furman-commuted offenders have lived a combined total of 1282 years in the community while committing [only] twelve violent offenses. . . ." Id. at 23. Only one out of 239 released on parole has committed another homicide. Id. at 24. "Both with regard to the commission of felonies generally and the crime of homicide, no other class of offender has such a low rate of recidivism [as do murderers]." Id. at 25 (quoting from H. Bedau, Recidivism, Parole, and Deterrence, in THE DEATH PENALTY IN AMERICA, 173, 175-80 (3d ed. 1982)). "[N]early 80% of those released to the free society have not, at least officially, committed additional crimes." Id. at 27.

The above data show that persons who have been deemed "dangerous" in reality pose no more of a threat to society than the average prisoner. In fact, they often pose less of a threat. Studies and cases show that "psychiatric predictions of violence are fundamentally of very low reliability." Note, People v. Murtishaw: Applying the Frye Test to Psychiatric Predictions of Dangerousness in Capital Cases, 70 Calif. L. Rev. 1069, 1074, 1074 nn.39-40 (1982). Society consistently has incorrectly predicted future dangerousness. Thus, a jury's finding of future dangerousness must be the result of arbitrary fact-finding, a clearly unconstitutional situation.

For the above stated reasons, the Virginia "future dangerousness" aggravating factor, as applied, violates the due process requirements of the Fourteenth Amendment, the Sixth Amendment right to an impartial jury, and the Eighth Amendment prohibition against cruel and unusual punishment of the U.S. Constitution, and Article I, Sections 9 and 11 of the Virginia Constitution.

IV. THE COURT'S CONSIDERATION OF ANY POST-SENTENCE REPORT MAY NOT INFRINGE UPON DEFENDANT'S RIGHTS TO DUE PROCESS, TO CONFRONT HIS ACCUSERS, TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, AND TO EFFECTIVE ASSISTANCE OF COUNSEL.

Virginia law provides that a trial court must review the propriety of a death sentence fixed by a jury. Virginia Code Section 19.2-264.5 provides that following a penalty determination of death

> the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate upon the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just. Reports shall be made, presented and filed as

provided in § 19.2-299. After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life.

While the report is entitled a post-sentence report and it comes after the jury's determination of a sentence, it precedes judicial imposition of a sentence.

Defendant challenges the constitutionality of any review pursuant to section 19.2-264.5 of any sentence of death in this case on the grounds (1) that the statute permits the death penalty to be imposed notwithstanding a showing of good cause that a life sentence is appropriate and just, and (2) that under the statute a post-sentence report may include hearsay. These challenges are based upon defendant's rights to due process, to confront any witnesses against him, to freedom from cruel and unusual punishment, and to effective assistance of counsel. These rights are guaranteed by both the federal and state constitutions. U.S. Const. Amends. VI, VIII, and XIV; and Va. Const., Art. I, §§ 8, 9 and 11.

A. Discretion To Disregard Good Cause Shown Violates Due Process And The Prohibition Against Cruel And Unusual Punishment.

To comport with due process and the prohibition on cruel and unusual punishment, a showing of good cause must result in leniency. By its terms, section 19.2-264.5 would permit a sentencing court in its discretion to impose the death penalty notwithstanding a showing of good cause. It states that "upon good cause shown, the court may set aside the sentence of death" and sentence the defendant to life in prison. Id. (emphasis added). This discretion may not be afforded

where the evidence in mitigation demonstrates that execution of the defendant would be unjust. See, e.g., Gregg, 428 U.S. at 189; Godfrey, 446 U.S. at 428 (state must obviate "standardless [sentencing] discretion"). Because Virginia does not require the trial court to sentence a defendant to life upon "good cause shown," its death penalty is unconstitutional.

The interpretation of section 19.2-264.5 by the Virginia Supreme Court does not cure the statute's constitutional infirmity. The Virginia Supreme Court has read the phrase "upon a showing of good cause" to "merely reiterate[] the rule applicable in all cases, misdemeanor, felony, or capital, when the court must consider altering a jury verdict. That same criterion applies in capital as well as non-capital cases." Bassett v. Commonwealth, 222 Va. 844, 284 S.E.2d 844, 854 (1981), cert. denied, 456 U.S. 938 (1982). However, the rule to which the Virginia Supreme Court apparently refers is set forth in Virginia Code Section 19.2-303. Section 19.2-303 provides that "[a]fter conviction, whether with or without jury, the court may suspend imposition of sentence or suspend the sentence in whole or part. . . ." Like section 19.2-264.5, section 19.2-303, is a discretionary standard. Accordingly, as applied, section 19.2-264.5 would permit the imposition of the death penalty notwithstanding a showing of good cause. It therefore violates the due process rights of death-sentenced defendants.

B. Hearsay In a Post-Sentence Report Violates Due Process And Guarantees Of Confrontation And Effective Assistance Of Counsel.

The manner in which the post-sentence report may be prepared and reviewed exposes defendant to substantial risk that his rights to confrontation, to due process, and to effective assis-

tance of counsel will be violated. In particular, the report may contain hearsay.[13]

The Virginia Supreme Court has held that the incorporation of hearsay evidence into the post-sentence report "is implicit from the language of Code § 19.264.5 and Code § 19.2-299, which permit a probation officer to 'thoroughly investigate and report upon the history of the accused and any other and all other relevant facts.'" O'Dell v. Commonwealth, 234 Va. 672, 364 S.E.2d 491, 508, cert. denied, 488 U.S. 871 (1988). Hearsay includes the transmission by another of the statements of a witness against the accused. The use of hearsay in a post-sentence report would deny the defendant the right to challenge his accusers. Indeed, the report may not even identify the persons upon whom the report relies for information.

1. The right to confront accusers effectively

"An accused has the right to be confronted by his 'accusers and witnesses,' Va. Const. Art. I, § 8, and 'the witnesses against him,' U.S. Const. Amend. VI." Bilokur v. Commonwealth, 221 Va. 467, 270 S.E.2d 747 (1980). Both federal and state constitutions also provide an accused with the right to effective assistance of counsel for his defense. U.S. Const. Amend. VI; Va. Const. Art. I, § 8.

The Virginia Supreme Court in O'Dell apparently addressed only a due process challenge to the inclusion of hearsay in a post-sentence report. 364 S.E.2d at 508 (distinguishing Gardner v. Florida, 430 U.S. 349 (1977)). Accordingly, that court has not considered whether the

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[13] Hearsay is objectionable where it violates any of defendant's constitutional rights. Because these rights are held by an individual and not by the government, there is no reciprocal constitutional obligation on defendant to avoid the use of hearsay in his defense.

use of hearsay in a post-sentence report would violate a defendant's independent state or federal rights to confront his accusers or to effective assistance of counsel.

The only court of which counsel is aware that has considered this issue held that the confrontation clause of Sixth Amendment applies to the content of a presentence report. United States v. Streeter, 907 F.2d 781 (8th Cir. 1990). This ruling makes sense. The probation officer assigned by law to prepare a presentence report is an officer of the court, an impartial body, and he or she certainly should not be considered among the defendant's accusers. Examining the probation officer, as the O'Dell court suggests, therefore, is not enough. See Section VI B.2, infra.

2. The right to due process

In Gardner v. Florida , 430 U.S. 349 (1977), the Supreme Court struck down a death sentence imposed after the trial court considered a presentence report not made available to the defendant. In doing so, the high court disapproved of its earlier divided decision in Williams v. New York, 337 U.S. 241 (1949), which upheld a sentence imposed in reliance upon a report prepared by the court's probation department which included hearsay evidence. In the intervening years since the Williams case was decided, the Supreme Court recognized that "death is a different kind of punishment from any other which may be imposed in this country." Gardner, 430 U.S. at 358 (citing cases). In decisions subsequent to Williams, the Supreme Court also made clear that the requirements of due process must be satisfied during any sentencing process. Id.

In dispensing with the logic of Williams, the U.S. Supreme Court stressed that the importance of the "truth-seeking function of trials" required it "to also recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases." Id. at 360. To offer effective "debate between adversaries" as to such facts, counsel

for the defense must be able to examine any witness against the accused. Id.

Contrary to the Virginia Supreme Court's conclusion in O'Dell, the due process clause of the Fourteenth Amendment to the United States Constitution, guarantees defendant the right either to confront any witness offering evidence against him, or to have that evidence excluded from consideration. The due process clause of Article I, § 11 of the Virginia Constitution also protects him against the use of hearsay in any post-sentence report prepared in this case. Because Section 19.2-264.5, as construed by the Virginia Supreme Court, violates these rights, Virginia's death penalty is unconstitutional.[14]

For the reasons stated, section 19.2-264.5 violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 8, 9 and 11 of Article I of the Virginia Constitution. Accordingly, the death penalty may not be imposed in this case.

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[14] An additional due process violation would occur were the Court to limit its consideration of the appropriateness and justness of the sentence fixed by the jury to the post-sentence report, as the literal language of the statute would suggest. Va. Code § 19.2-264.5. In addition to any facts that the probation officer may bring to bear on the issue of proper punishment, the Court must consider all of the facts otherwise available to it from any of the proceedings in this case including any evidentiary hearing before the Court prior to the imposing of sentence. In Bassett, the Virginia Supreme Court indicated a willingness to construe broadly the "good cause shown" language of this statute to require the trial court to consider all evidence submitted in the case, 222 Va. 844, 284 S.E.2d at 854. However, defendant preserves the right to brief this issue at a later date should he find it necessary.

V. VIRGINIA'S DEATH PENALTY STATUTES ARE UNCONSTITUTIONAL AS APPLIED BECAUSE THEY DENY DEATH-SENTENCED DEFENDANTS MEANINGFUL APPELLATE REVIEW.

Virginia provides for direct review by the State Supreme Court of a death sentence. Va. Code Section 17.1-313. Regardless of whether an appeal is taken from a capital case, Virginia provides that the State Supreme Court must consider and determine:

> 1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and
>
> 2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Id. § 17.1-313(C). The statute further provides for the Court to compile records of "all capital felony cases" to assist the Court in its determination of whether the death penalty in a particular case was excessive. Id. § 17.1-313(E). These mandatory state provisions trigger defendant's constitutional rights. See Hicks v. Oklahoma, 447 U.S. 343, 345-46 (1980) (holding that defendant had a liberty interest based on statutory right to jury sentence). Because the Virginia Supreme Court has not applied either of the enumerated procedures consistent with constitutional requirements of due process and equal protection, or the prohibitions against cruel and unusual punishment, the death penalty must not be imposed upon defendant.[15]

Section 17.1-313 is unconstitutionally applied by the Virginia Supreme Court

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[15] Section 17.1-313 provides in full that "[t]he Supreme Court may accumulate the records of all capital felony cases tried within such period of time as the court may determine. The court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive. Such records as are accumulated shall

because the Court does not (1) consider mitigating circumstances; (2) conduct harmless error analysis; (3) consider all capital felony cases; or (4) independently determine whether passion, prejudice, or any other arbitrary factor, influenced a death sentence. In addition, the state impermissibly singles out death sentences for expedited review.

A. Virginia's Proportionality Review Is Not Meaningful.

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be made available to the circuit courts."

The U.S. Supreme Court has recently reiterated the Eighth Amendment's "twin objectives" of "measured consistent application and fairness to the accused," regarding death penalty procedures. Clemons v. Mississippi, 494 U.S. 738, 748 (1990). In Clemons, the Court upheld Mississippi's procedure of appellate reweighing of aggravating and mitigating factors, following the invalidation of an aggravating factor, to determine whether a sentence of death is proper. Id. at 1449. As discussed below, Virginia's appellate review does not satisfy these constitutional requirements.[16]

1. Virginia Supreme Court proportionality review gives no weight to mitigating evidence.

Bearing the Eighth Amendment objectives discussed in Clemons in mind, Virginia's death sentence review process does not include consideration of mitigating evidence to determine whether the jury's sentencing decision is sustainable. The review is limited to determining sufficiency of evidence of aggravating factors. The Court may not "refuse to consider, as a matter of law, any relevant mitigating evidence." Eddings, 455 U.S. at 114 (emphasis in original). Like the jury, the Virginia Supreme Court in reviewing a sentence must also give effect to mitigation evidence. Cf. Penry, 492 U.S. at 321. Accordingly, for the reasons stated in Section I of this brief, the absence of a standard of review whereby aggravating circumstances are considered relative to mitigating circumstances renders Virginia's death penalty statutes unconstitutional. See also Clemons, 494 U.S. at 754.

2. Virginia's Supreme Court unduly restricts the cases to which it

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[16] Since the Virginia Supreme Court began conducting appellate review, the court has not reversed a single death sentence for passion, prejudice or disproportionality.

compares a death sentence case to determine whether the sentence is proportional.

Section 17.1-313 makes available to the Virginia Supreme Court "the records of all capital felony cases" for its proportionality review. Va. Code Ann. § 17.1-313(E) (emphasis added). That section then provides that "[t]he court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive." Id. However, the Court arbitrarily limits its review to only those capital cases that it actually reviews. Boggs v. Commonwealth, 229 Va. 501, 522, 331 S.E.2d 407, 422 (1985), cert. denied, 475 U.S. 1031 (1986); see Clozza v. Murray, 913 F.2d 1092, 1105 (4th Cir. 1990), cert. denied, 111 S. Ct. 1123 (1991)(refusing to consider petitioner's challenge to scope of cases included in Virginia Supreme Court's proportionality review because Virginia Supreme Court considered petitioner's case "the worst on record"). The Court's practice eliminates from its review a large number of cases in which capital felony defendant's receive life sentences. No Supreme Court review of life sentences is required and an appeal in such cases is discretionary.

The severity and extent to which the court abdicates its responsibility under section 17.1-313 is especially egregious. For example, as of August of 1990, of the sixty-seven capital cases in which the defendant had received a life sentence, only ten had been appealed to the Virginia Supreme Court. Fisher v. Murray, Petition for Writ of Habeas Corpus, Filed in The Circuit Court for the County of Bedford, 191, (August 3, 1990). In the remaining fifty-seven cases, the Virginia Supreme Court has not accepted the appeals, and their records, therefore, are not considered when the court conducts Section 17.1-313 proportionality review. Id. The State Supreme Court's failure to include these fifty-seven cases leads to an intolerable bias towards the imposition of the death

penalty. A proportionality review that excludes from its purview nearly every case in which the sentencing authority opted for life, removes from the court's consideration many cases in which the defendant may have committed atrocious capital murders. The exclusion of these cases tends to lower the court's perception of what conduct will suffice to merit the death penalty. The Court's resulting misperceptions deprive those sentenced to death of their right to the effective proportionality review that the Virginia legislative intended as a meaningful check against the arbitrary imposition of the death penalty.

Finally, Section 17.1-313 requires the Virginia Supreme Court, in conducting proportionality review, to consider "both the crime and the **defendant**." Va. Code Ann. § 17.1-313(C)(emphasis added). The Virginia Supreme Court has adhered to this statutory mandate only one time. Peterson v. Commonwealth, 225 Va. 289, 302 S.E. 2d 520 (1983). That Court will occasionally describe the defendant's criminal record in its review of a future dangerousness finding, e.g., Ramdass v. Commonwealth, 246 Va. 413, 437 S.E. 2d 566 (1993). In those cases, however, there is no comparison of the defendant with others who have received a death sentence.

Because proportionality review is mandated by the state, Defendant's due process and other constitutional rights attach. See Pulley v. Harris, 465 U.S. 37, 54 (1984) (Stevens, J., concurring) (discussing importance of meaningful appellate review); Parker v. Dugger, 498 U.S. 308, 313 (1991). Inasmuch as the administration of this review is arbitrary and prejudicial to death-sentenced defendants, it is unconstitutional.

B. The Virginia Supreme Court Has Abdicated Its Responsibilities To Independently Ascertain Whether Passion, Prejudice, Or Any Other Arbitrary Factor Influenced A Death Sentence.

Although Virginia provides death-sentenced defendants with a statutory right to a review by the Virginia Supreme Court of their sentences to determine whether any of the sentences were influenced passion, prejudice, or any other arbitrary factor, the Court has never properly performed such a review. Rather than investigate whether any arbitrary factor played a role in the sentencer's decision-making, the Court has simply affirmed any sentence in which an aggravating factor was found. But the presence of an aggravating factor does not indicate whether any arbitrary factor was improperly considered by the jury. Indeed, it is entirely possible that a sentence relied wholly upon passion, prejudice, or some other arbitrary factor, notwithstanding the presence of an aggravating factor. Thus, the court has abrogated capital defendants' state-created rights and violated

the Eighth and Fourteenth Amendments.[17]

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[17] Examples of cases in which the Virginia Supreme Court relied on the presence of an aggravating factor are Poyner v. Commonwealth, 229 Va. 401, 429, 329 S.E.2d 815, 834, cert. denied, 474 U.S. 865 (1985) (holding there was no passion or prejudice because evidence of guilt was sufficient and evidence during penalty phase was ample); Peterson v. Commonwealth, 225 Va. 289, 302 S.E.2d 520, 527-28, cert. denied, 464 U.S. 865 (1983) (holding presentation of evidence in support of future dangerousness proves that arbitrary factors did not influence sentencer to impose death sentence); Clanton v. Commonwealth, 223 Va. 41, 56-57, 286 S.E.2d 172, 180 (1982) (holding that neither passions nor prejudice influenced sentencer to impose death sentence because there was ample evidence to support jury verdict based upon findings that Clanton had propensity for violence and that capital murder was offense of exceptional ferocity). The following portion of the Peterson v. Commonwealth opinion is illustrative:

> As the record shows, Peterson was in constant difficulty with the juvenile authorities from an early age. . . . [A]s an adult he was convicted of breaking and entering and grand larceny. . . . All this evidence, which the jury and the trial judge obviously accepted, showed Peterson to be a dangerous man who would probably

> commit other acts of violence if given any opportunity to do so. Accordingly, we hold that the death sentence was not influenced by any arbitrary factors.

Peterson, 226 Va. at 289, 302 S.E.2d at 528 (emphasis added).

The Virginia Supreme Court also subrogates capital defendants' rights under section 17.1-313 when the court conducts a passion/prejudice review and considers whether the defendant has raised particular instances of passion or prejudice in this appeal. See, e.g., Turner v. Commonwealth, 234 Va. 543, 555, 364 S.E.2d 483, 490 (1988), cert. denied, 486 U.S. 1017 (1988) (in ascertaining the absence of passion or prejudice in sentencer, significant that defendant does not point to any passion or prejudice); Poyner, 229 Va. at 435, 329 S.E.2d at 837 (same); Justus v. Commonwealth, 222 Va. 667, 681, 283 S.E.2d 905, 913 (1981), cert. denied, 455 U.S. 983 (1982) (same). Such an approach to administering section 17.1-313 passion/prejudice review is in direct contravention to the provision's dictates.

Section 17.1-313 affords the capital defendant a mandatory review for arbitrary sentencing, independent of the review process for defendant's assignments of error. See Va. Code. Ann. § 17.1-313(C). The section provides that "[i]n addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine . . . [w]hether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor." Id. Regardless of whether or not the defendant points to instances of prejudice, Section 17.1-313 mandates that the Virginia Supreme Court independently ascertain that prejudice did not influence the sentencing process. Id.

Since the Virginia Supreme Court does not independently review the record for the influence of improper factors in sentencing, it has failed to properly implement section 17.1-313(C), and, in doing so, it has violated the rights of death-sentenced defendants. Accordingly, Virginia's death penalty statutes are unconstitutional.

C. Virginia's Imposition Of Expedited Review In Death Cases Is

Unconstitutional.

Section of the Virginia Code provides that the State Supreme Court "shall, in setting its docket, give priority to the review of cases in which the sentence of death has been imposed over other cases pending in the Court." Va. Code Ann. § 17.1-313 (G). Defendant challenges the constitutionality of this expedited review provision as violative of his rights to due process, to effective assistance of counsel, to present a defense, and to equal protection of the laws, which are found in the United States and Virginia Constitutions.

Section 17.1-313(F) provides for the State Supreme Court to consolidate its death sentence review with any appeal made by the defendant. Section 17.1-313(F) therefore would serve to accelerate the Supreme Court's review of any issues that defendant may raise on appeal, preventing him and his counsel from adequately presenting the merits of his position. Certainly in cases of this magnitude -- where the Court's decision may result in the execution of the defendant -- the defendant should have the opportunity that other defendants have in non-capital cases to pursue his appeal in a considered fashion.

Yet, Virginia has not only eliminated intermediate appellate review during which issues and arguments are further perfected (a procedures that Defendant also challenges), but it has also disadvantaged death-sentenced defendants by providing them with substantially less time than other criminal defendants to protect their legal rights. At the very minimum, constitutional law requires that defendant be given the opportunity to elect not to have his appeal expedited. See, e.g., Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. State of Alabama, 287 U.S. 45 (1932); Anders v. California, 386 U.S. 738, 744 (1967) (regarding right to effective assistance of counsel); Ruetz v. Lash, 500 F.2d 1225 (7th Cir. 1974) (equal protection and due process); Furman, 408 U.S.

at 238.[18]

As explained in Section VI of this memorandum, Virginia does not provide meaningful appellate review under the Sixth, Eighth or Fourteenth Amendments to the United States Constitution or Sections 8, 9 or 11 of the Virginia Constitution. Accordingly, its death penalty is unconstitutional.

CONCLUSION

For the foregoing reasons, individually and collectively, Defendant respectfully moves this Court to declare Virginia's capital murder and death penalty statutes unconstitutional under federal and state law and to prohibit the imposition upon Defendant of the death penalty.

Respectfully submitted,

LEE BOYD MALVO

By_____
Co-Counsel

and

By_____
Co-Counsel

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[18] By contrast, the Virginia Supreme Court apparently does not give priority on its dockets to writs of habeas corpus from death row inmates. Virginia Code § 17.1-310 (concerning writs of habeas corpus). Defendant submits that the state's priority placement on the State Supreme Court's docket of death sentence reviews and appeals is irrational.

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this 10th day of February, 2003.

Co-Counsel

Co-Counsel

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,

v.

CRIMINAL NO. 102888
Hon. Jane Marum Rousch

LEE BOYD MALVO,

Defendant.

DEFENDANT MALVO'S
MOTON TO PRECLUDE USE OF UNADJUDICATED ACTS

COMES NOW the defendant, Lee Boyd Malvo, by and through his co-counsels, pursuant to the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and Article I, Section 8 and Section 11 of the Constitution of the Commonwealth of Virginia and moves this Honorable Court for an order precluding the Commonwealth from using evidence of any prior unadjudicated acts of Defendant in Commonwealth's attempt to demonstrate "future dangerousness" of Defendant.

As grounds for this Motion, Defendant states the following:

1. In pursuing a capital sentence based on future dangerousness of the defendant, the prevailing view is to admit evidence that the fact finder would find relevant to sentencing. "In determining the probability of a defendants future criminal conduct, it is essential ... that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek v. Texas*, 428 U.S. 262, 275 (1976), *LeVasseur v. Commonwealth*, 225 Va. 564, 593-594 (1983).

2. The fact finder is entitled to consider defendant's past criminal record of convictions as well as matters which the court deem relevant to sentencing, including prior history of the defendant or circumstances surrounding the commission of the offense and the heinousness of

the crime. *Edmonds v. Commonwealth*, 229 Va. 303 (1985). See VA Code Ann. §§19.2-264.2 & 19.2-264.4(c).

3. Use of Defendant's criminal record must be limited to relevant information when considering Defendant's future threat to society. Such matters consist of prior adjudicated criminal acts which have been conclusively determined and may indicate a future danger or threat.

4. The use of unadjudicated criminal conduct is not relevant information when considering Defendant's future threat to society because such conduct has not been conclusively established and thus cannot aid the sentencer as information about the individual defendant whose fate it must determine. The unadjudicated criminal conduct has not been positively connected to the Defendant and, therefore, cannot serve the goal of aiding the sentencer as information about the Defendant.

5. The use of unadjudicated criminal conduct in the penalty phase offends notions of reliability required by due process as applied to capital sentencing proceedings. The unique nature of the death penalty requires additional protection during pretrial, guilt and sentencing stages. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis added). Due process demands a greater degree of reliability in a process that can determine death as the appropriate punishment. See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

6. The Commonwealth's reliance upon unadjudicated criminal conduct as proof of the future dangerousness predicate for imposition of the death penalty offends due process in that the evidence offered has not been established by any standard of proof whatsoever.

7. In a criminal case, due process requires that the prosecution establish beyond a reasonable doubt every element of a crime with which Defendant is charged. In re Winship, 397

U.S. 358 (1970). The Commonwealth may not constitutionally shift the burden of proof concerning those crimes upon the Defendant. *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

8. In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the United States Supreme Court noted that although the reasonable doubt rule does not normally apply to sentencing, the rule is implicated if the challenged factor "exposed [the defendant] to greater or additional punishment," Id. at 88, and the defendant is faced with a "radically different situation from the usual sentencing proceedings." Id. The Supreme Court has repeatedly made clear that capital sentencing is "qualitatively different" and requires greater reliability than normal sentencing. Given that the Commonwealth is relying on unadjudicated acts to expose the Defendant to greater or additional punishment (i.e., the death penalty, and that capital sentencing carries special concerns for reliability), use of unadjudicated acts falls within Winship's requirements for the reasonable doubt rule to apply.

9. Use of unadjudicated criminal acts also compromises Defendant's due process rights to notice and a meaningful opportunity to be heard on evidence used against him. Admission of evidence at the penalty trial of prior unadjudicated criminal acts results in an inability to exercise a meaningful opportunity to defend himself because he has not been accorded sufficient notice or hearing on those issues. Notice and meaningful opportunity to be heard are the cornerstones of due process of law. See *Lankford v. Idaho*, 111 S.Ct. 1723, 1733 (1991), *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

10. The Sixth Amendment right to effective assistance of counsel also entitled Defendant to be informed of the nature and cause of the accusations against him. It is well settlement that the Sixth Amendment entitled Defendant to effective assistance of counsel at the sentencing

phase as well as the guilt/innocence phase of a capital trial. See *Strickland v. Washington*, 466 U.S. 668 (1984).

11. If the Commonwealth is permitted to introduce evidence of prior unadjudicated misconduct of the Defendant at the penalty trial, Defendant must be permitted effective representation to defend against those accusations.

12. When allegations have been made against the Defendant without sufficient notice, no meaningful opportunity to be heard, and no evidentiary standard of proof, counsel is precluded from providing effective assistance (any assistance) to the accused in defending against the Commonwealth's allegations. Counsel has been afforded little time, opportunity to investigate, and no level of scrutiny by which the evidence will be judged. Indeed, even given notice, standard of proof and full due process considerations, counsel defending against prior unadjudicated criminal conduct is beyond the resources realm of effective representation in defendant a single capital crime. See *United States v. Cronic*, 466 U.S. 648 91984).

13. The Supreme Court has indicated that some circumstances exist in which "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing ... [making] the adversary process itself presumptively unreliable." Cronic at 659. Requiring the accused t defend against unadjudicated acts offends the notion of fairness in the adversarial system as defendant counsel can not possibly be expected to defend against all conceivable accusations made against the defendant at the sentencing phase. As the Court indicated in Cronic, circumstances of great magnitude may be present on some occasions when, even though counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that the court must presume prejudice. Id. at 646-647.

Wherefore, Defendant respectfully requests this Honorable Court enter an Order precluding the Commonwealth from using prior unadjudicated acts of Defendant in pursuing a sentence of death based n future dangerousness.

Respectfully submitted,

LEE BOYD MALVO.

By_____
Co-Counsel

and

By_____
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Co-Counsel

Co-Counsel

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,

v.

CRIMINAL NO. 102888
Hon. Jane Marum Roush

LEE BOYD MALVO,

Defendant.

DEFENDANT MALVO'S MOTION FOR NOTICE OF PRIOR UNADJUDICATED ACTS

COMES NOW the defendant, Lee Boyd Malvo, by and through his co-counsels, pursuant to VA Code Section §19.2-264.3:2, Article I, Sections 8 and 11 of the Constitution of the Commonwealth of Virginia, and the Sixth and Fourteenth Amendments to the United States Constitution, and moves this Honorable Court for an Order requiring the Commonwealth to:

1. Give defendant written notice of any unadjudicated acts which the Commonwealth intends to introduce in support of its claim of "future dangerousness";

2. Such notice shall include a description of the alleged unadjudicated criminal conduct and, as specifically as possible, the time and place such conduct is alleged to have occurred;

3. Provide such notice by or before April 1, 2003. "The Court shall specify the time by which such notice shall be given." VA Code Ann. §19.2-264.3:2 (1993). According to due process requirements of the capital penalty phase, a defendant must be given sufficient time to adequately prepare a defense to the alleged unadjudicated acts.

Should the Commonwealth fail to provide such notice by April 1, 2003, the defendant requests that this Court preclude the Commonwealth from introducing evidence of Defendant's alleged unadjudicated criminal conduct on due process grounds;

The defendant further requests that the Commonwealth be place on a continuing duty to notify the defendant of alleged unadjudicated acts which the Commonwealth intends to introduce at sentencing for proof of "future dangerousness." These acts shall include, but not be limited to, any allegations of prior conduct committed by the Defendant of which the Commonwealth has recently or subsequently become aware or conduct which has arisen since the date of April 1, 2003.

Respectfully submitted,

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Co-Counsel

Co-Counsel

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,

v.

CRIMINAL NO: 102888
Hon. Jane Marum Roush

LEE BOYD MALVO,

Defendant

DEFENDANT MALVO'S MOTION IN LIMINE REGARDING THE ADMISSIBILITY OF CRIME SCENE AND AUTOPSY PHOTOGRAPHS

The defendant, Lee Boyd Malvo, by his counsel, moves the Court to exclude for use in evidence by the prosecution certain photographs of the victim of he subject crime that were taken at the crime scene and during the victim's autopsy.

The photographs, as might be expected in any homicide case, are quite graphic in their deception of the victim's death and the autopsy that followed. It is acknowledged that the matter is within the sound discretion of the court and that such photographs are often admitted into evidence on the basis that they are relevant to issues of motive, intent, method, malice and/or premeditation. See, e.g., *Williams v. Commonwealth*, 234, Va. 168, 177, 360 S.E.2d 367 (1987)(citing cases). See also, e.g., *Chichester v. Commonwealth*, 248 Va. 311, 326, 448 S.E.2d 638 (1994). However, in the instant case, it is anticipated that the evidence will establish that the victim suffered multiple wounds and was asphyxiated, with predictable graphic photographic results. The defense will stipulate the identity of the victim and it is assumed that the anticipated testimony of the medical examiner, combined with the contents of the autopsy report, will establish cause and method of death so as to eliminate the necessity or propriety for the admission of the subject photographs.

Accordingly, it is asserted that the introduction of new evidence during at least the guilty phase of the defendant's capital murder trial of the related crime scene and autopsy photographs unnecessary to establish any material element of the crimes alleged and that their introduction will only serve to prejudice and inflame the jury against the defendant as the alleged perpetrator of the subject crime(s). Any relevance their introduction into evidence may have would be clearly outweighed by their obvious prejudicial impact such that their admission would violate the defendant Malvo's basic due process right(s) to a fair trial in violation of the Fourteenth Amendment of the Constitution of the United States and Article I, §11 of the Constitution of the Commonwealth of Virginia.

The aforementioned considered, it is respectfully submitted, that the instant motion should be granted.

Respectfully submitted,

LEE BOYD MALVO

By_____
Co-Counsel

and

By_____
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Co-Counsel

Co-Counsel

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,

v. CRIMINAL NO. 102888
Hon. Jane Marum Roush

LEE BOYD MALVO,

Defendant

DEFENDANT MALVO'S MOTION TO LIMIT EXCESSIVE NUMBERS OF LAW ENFORCEMENT OFFICERS SITTING AND/OR STANDING NEAR THE DEFENDANT DURING TRIAL

COMES NOW the defendant, Lee Boyd Malvo, by and through his co-counsels and moves the Court pursuant to the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and to the laws and Constitution of the Commonwealth of Virginia, to limit the number of law enforcement officers standing and/or sitting around the Defendant. In support of his motion, Defendant states the following:

1. Having a number of law enforcement officers sitting in the courtroom during the course of the trial under the unique circumstances of this case will send a message to the jury that the Defendant is dangerous and that extra security is needed to protect the jury from him.

2. For the Court to limit the number of officers will in no way prejudice the Commonwealth's case and will in no way interfere with a public trial.

WHEREFORE, defendant respectfully requests that the Court enter an Order limiting the

number of officers sitting and/or standing near the defendant.

Respectfully submitted,

LEE BOYD MALVO.

By

Co-Counsel

and

By

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Co-Counsel

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VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,

v. CRIMINAL NO. 102888
Hon. Jane Marum Roush

LEE BOYD MALVO,

Defendant

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO LIMIT EXCESSIVE NUMBERS OF LAW ENFORCEMENT OFFICERS SITTING AND/OR STANDING NEAR THE DEFENDANT DURING TRIAL

The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment of the Constitution of the United States and Article I, Section 8 of the Constitution of the Commonwealth of Virginia. As stated by the Court in *Estelle v. Williams*, "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1975). The Court further stated that "[t]o implement the presumption, courts must be alerted to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established beyond a reasonable doubt." Id.

If there are excessive numbers of law enforcement officers allowed to secure the Defendant in the courtroom, there is a high probability that jury members will be subjected to strong pressures of bias and prejudice against the Defendant. Consequently, the presumption of innocence so valued in the criminal justice system will be tainted.

The Supreme Court in *Holbrook v. Flynn* addressed the question of whether uniformed police officers in the courtroom during a trial would prejudice a defendant. *Holbrook v. Flynn*,

475 U.S. 560 (1985). The Court reasoned that the sight of a security force in the courtroom might "create the impression in the minds of the jury that the defendant is dangerous or untrustworthy."" Id. at 569. The Court stated that whenever a question arises as to whether there is an inherently prejudicial courtroom arrangement, it must be examined on a case by case basis. Id. The question to be resolved by the court is not whether jurors actually articulate a consciousness of any prejudicial effect (in case they are asked about the arrangement in voir dire), but rather whether an unacceptable risk is presented of impressible factors. Id. at 570.[1]

In the present case, excessive numbers of law enforcement officers are not necessary to secure the Defendant. An excessive number of officers will not fulfill a need in the security interest of the court. Rather, their mere presence will serve as a constant reminder to the jury, regardless of the stage in the trial, that the Defendant may be a dangerous individual. In *Norris v. Risley*, the Ninth Circuit discussed the standard for determining whether non-verbal communication (in the form of approximately twenty women wearing "Women Against Rape" buttons in a trial for rape) by courtroom spectators would affect a defendant's right to a fair trial. The court wrote:

> ...bearing in mind that jurors are extremely likely to be impregnated by the environing atmosphere and being alert to factors that may undermine the fairness of the fact-finding process we must determine, based on reason, principle, and common human experience whether the circumstances described ... created an unacceptable risk of impermissible factors coming into play and were thus so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial.

---

[1] The facts of Holbrook guided the Court to allow the uniformed police officers to be present at trial. There were in fact only four officers in the Holbrook case, and they were used to supplement the depleted court security personnel. The Court held that the state was furthering its legitimate interest in maintaining the safety of the court and facilitating the transportation of the six defendants.

The American Bar Association supports the view that "ordinarily there should not be an excessive show of force through the attendance at the trial of a great many law enforcement officer." American Bar Association Standards for Criminal Justice, 15-3.1(c) (2nd ed. 1980).

Risley, 878 F.2d at 1182.1

Accordingly, Defendant respectfully requests that the Court enter an Order limiting the number of officers sitting and/or standing near the Defendant.

Respectfully submitted,

LEE BOYD MALVO

By_____
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and

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CERTIFICATE OF SERVICE

We/I hereby certify that a true copy of the foregoing Motion/Memorandum was mailed, first class, to:

Robert F. Horan, Jr., Esquire
Commonwealth's Attorney
4110 Chain Bridge Road

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Fairfax, VA 22030

and the original was forwarded for filing to the

Hon. John T. Frey
Clerk
Fairfax County Circuit Court
Fairfax County Judicial Center
4110 Chain Bridge Road
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and a true copy was forwarded to the

Hon. Jane Marum Roush
Judge
Fairfax County Circuit Court
Fairfax County Judicial Center
4110 Chain Bridge Road
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this 10th day of February, 2003.

Co-Counsel

Co-Counsel

VIRGINIA:

IN THE CIRCUIT COURT FIR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,

v. CRIMINAL NO. 102888
Hon. Jane Marum Roush

LEE BOYD MALVO,

Defendant.

DEFENDANT MALVO'S MOTION FOR ADDITIONAL PEREMPTORY CHALLENGES

COMES NOW the defendant, Lee Boyd Malvo, by and through his co-counsels, pursuant to the 6th, 8th, 14th Amendments to the Constitution of the United States and Article I, Section 8 and 11 of the Constitution of the Commonwealth of Virginia, and moves this Court to permit for an Order allowing him additional peremptory challenges. In support of this motion, he alleges:

1. That the defendant stands indicted for capital murder;

2. That Section 19.2-262 of the Code of Virginia, as amended, allows the defendant only four peremptory challenges;

3. That the defendant faces a sentence of death and is entitled to additional peremptory challenges in jury selection based upon his being charged with three (3) separate offenses;

4. Additional peremptory challenges are necessary in this capital case to insure defendant the effective assistance of counsel, right to a fair and impartial jury, and reliability of verdicts requires by the 6th, 8th and 14th Amendments to the Constitution of the United States, and Article I, Sections 8 and 11 of the Constitution of the Commonwealth of Virginia.

5. That the federal courts and twenty (20) states including Alabama, Georgia, North Carolina, South Carolina, Arkansas, Kentucky, Tennessee, Minnesota, New Mexico, Oregon,

West Virginia, Maryland, Missouri, Michigan, Nebraska, Delaware, New Hampshire and New Jersey allow the defendant more challenges than the prosecution;

6. That this court has the inherent authority to grant the defendant additional peremptory challenges pursuant to Article I, Section 8 and Section 11 of the Constitution of Virginia, the Fifth Amendment to the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, the defendant prays that this Court enter an order granting him additional peremptory challenges.

Respectfully submitted,

LEE BOYD MALVO

By _____
Co-Counsel

and

By _____
Co-Counsel

Michael S. Arif, Esquire
Martin, Arif, Petrovich & Walsh
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Co-Counsel

Co-Counsel

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,

v.

CRIMINAL NO. 102888
Hon. Jane Marum Rousch

LEE BOYD MALVO,

Defendant

DEFENDANT MALVO'S MEMORANDUM IN SUPPORT OF MOTION FOR ADDITIONAL PEREMPTORY CHALLENGES

The U.S. Supreme Court has held that death is qualitatively different from any other penalty and that difference calls for a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a particular case. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). The additional procedural safeguards required at the trial level in capital cases, see *Murray v. Giarranton*, 109 S. Ct. 2765, (1989), apply to jury selection procedures in particular because the jury determines both guilt or innocence and sentence. Due to the unique nature of a death penalty trial, and the impossibility of revealing all prejudgment and predisposition of potential jurors during voir dire, the defendant is entitled to additional peremptory challenges to ensure rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

Furthermore, because the state is seeking the death penalty, there is greater need for additional peremptory challenges to screen out any bias and prejudice in the selection of the Defendant's jury to ensure that the sentencing decision is not the result of arbitrary factors or prejudice. See *Woodson v. North Carolina*, 420 U.S. 280, 305 (1976); *Gardner v. Florida*, 430 U.S. 329, 357-58 (1977).

Additionally, in the federal courts and in twenty states, including Alabama, Georgia, North Carolina, South Carolina, Arkansas, Kentucky and Tennessee, defendants are entitled to more than four peremptory challenges and are entitled to a greater number of peremptory challenges than is the sate, even in non-capital cases. See J. Van Dyke, Jury Selection Procedures, 282-3 (1977). Thus, a request that this court grant additional challenges is not a novel procedure, but is merely a request to employ a practice already recognized in many courts as necessary to protect a defendant's right to a fair trial, even in non-capital cases.

WHEREFORE, the defendant prays that this court enter an order granting him additional peremptory challenges.

Respectfully submitted,

LEE BOYD MALVO.

By _____
Co-Counsel

and

By _____
Co-Counsel

Michael S. Arif, Esquire
Martin, Arif, Petrovich & Walsh
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~~Co-Counsel~~

Co-Counsel

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,

v.

CRIMINAL NO. 102888
Hon. Jane Marum Roush

LEE BOYD MALVO,

Defendant.

DEFENDANT MALVO'S MOTION FOR INDIVIDUAL AND SEQUESTERED VOIR DIRE

COMES NOW the defendant, Lee Boyd Malvo, by and through co-counsels, pursuant to the 6th 8th, 14th Amendments to the Constitution of the United States and Article I, Section 8 and Section 11 of the Constitution of the Commonwealth of Virginia and moves this court to allow counsel to voir dire prospective jurors individually, separate and apart each from the other, and to sequester the jurors from the courtroom during voir dire in order to prevent the jury panel from hearing the questions being asked individual jurors. In support of this motion, the Defendant alleges:

1. That the Defendant is charged with capital murder:

2. That collective voir dire of jurors in panels will expose all jurors to prejudicial and incompetent material, thereby rendering it impossible to select a fair and impartial jury in violation of the 6th Amendment to the Constitution of the United States;

3. That a thorough inquiry into the effect of pretrial publicity on each juror will be necessary to determine if any has been prejudiced, or can no longer be fair and impartial, and/or has prejudged the case.

4. That a thorough inquiry into the prospective juror's attitudes towards the death penalty will be necessary in order to determine whether the views of the prospective jurors would prevent or substantially impair the performance of their duties as jurors in accordance with law.

WHEREFORE, Defendant respectfully requests that the Court grant his motion and order individual and sequestered voir dire.

Respectfully submitted,

LEE BOYD MALVO

By _____
Co-Counsel

and

By _____
Co-Counsel

Michael S. Arif, Esquire
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Co-Counsel

Co-Counsel

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,

v. CRIMINAL NO. 102888
Hon. Jane Marum Roush

LEE BOYD MALVO,

Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT MALVO'S MOTION FOR INDIVIDUAL VOIR DIRE AND SEQUESTERED VOIR DIRE

COMES NOW the defendant, Lee Boyd Malvo, by co-counsels, and files this Memorandum of Law in support of Defendant's motion for individual voir dire and sequestered voir dire.

ARGUMENT

Any decision to impose the death penalty shall be based upon reason rather than caprice or emotion. See Gardner v. Florida, 430 U.S. 349, 97 S. Ct. 1197, 51 L.Ed.2d 393 (1977). The trial court is afforded great latitude and discretion in structuring the method in which voir dire will be conducted. See Rosales-Lopez v. United States, 451 U.S. 182, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981). Individual voir dire is best designed to achieve the objective of eliminating biased jurors. Individual voir dire is also critical to ensure that the Defendant's 6th Amendment right to an impartial jury will be honored.

In order to achieve the objective of an impartial jury, psychologists have studied questions asked of jurors. When questioned in a group, jurors quickly learn which responses will disqualify them and which responses which will allow them to serve. Bush, The Case for Expansive Voir Dire, 2 Law and Psychology Review 9 (jurors subjected to group voir dire

learned what response would disqualify them and withheld that information). Based on this concern, and the serious nature of the proceedings against the Defendant, and the serious nature of the proceedings against the defendant, the procedure of individual sequestered voir dire is specifically appropriate for two reasons. First, the Defendant has a right to a fair and impartial jury. Veniremen may be excluded if it is shown that they are unable to follow the trial judge's directions and the law regarding imposition of the death sentence.

The case of Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct 844, 852, 83 L.Ed.2d 841 (1985), requires that the method of voir dire excluded veniremen if their attitude toward the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Id. at 424. Individual sequestered voir dire eliminates such contamination of the venire and provides for efficient and effective compliance with the requirements of the law. During questioning, group voir dire increases the opportunity for potential bias of prospective jurors while inhibiting honest responses.

Second, the Supreme Court has held that death is qualitatively different from any other penalty and that difference calls for a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a particular case. See generally, Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 94 (1976). The additional procedural safeguards, applicable at trial level in capital cases, See Murray v. Giarratano, 492 U.S. 1, 109 S. Ct. 2765, 106 L.Ed.2d 1, 57 U.S.L.W. 4889 (1989), are particularly applicable to jury selection procedures because the jury determines both guilt or innocence and sentence.

Thus, the Defendant's Sixth Amendment right to effective assistance of counsel and to an impartial jury requires that more be done by counsel for both parties to me this heightened

reliability standard. Consequently, defense counsel is constitutionally bound to make informed decisions about potential jury members. Collective voir dire of jurors in panels will preclude the candor and honesty on the part of the juror which is necessary for counsel to make these informed decisions. During individual voir dire, both questions and answers are more individualized and thereby provide information regarding venireman and thus satisfying the Sixth Amendment requirements.

For these reasons, the Defendant moves this Court to grant the motion set out above.

Respectfully submitted,

LEE BOYD MALVO.

By_____
Co-Counsel

and

By_____
Co-Counsel

Michael S. Arif, Esquire
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Co-Counsel

Co-Counsel

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,

v. CRIMINAL NO. 102888
Hon. Jane Marum Roush

LEE BOYD MALVO,

Defendant.

MOTION FOR EXPERT INVESTIGATORS

COMES NOW the defendant, Lee Boyd Malvo, by his co-counsels, and pursuant to the Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Husske v. Commonwealth, 252 VA. 203, 476 SE2d 920 (1996) and moves the Court to appoint the following expert to assist him in the defense of his case.

A. Five or more investigators trained in criminal work to investigate, interview witnesses, collect data, and analyze all information and evidence associated with the crime with which the defendant is charged.

B. Defendant further moves that the Court provide funds for the reasonable compensation of the investigators for their services.

As grounds for this motion, the defendant states:

1. Defendant has been charged with the offense of capital murder under Virginia Code Sections §18.2-31 (8) and (13).

2. Defendant is an indigent juvenile represented by appointed counsel who is unable to provide funds for any aspect of his defense.

3. This case involves allegations of acts in multiple locations and jurisdictions around the United States. Some investigation of each is necessary to prepare for the guilt/non-guilt phase of

this trial. In additions, the defendant's background includes stays in Jamaica, Antiqua, Washington State. Proper preparation of mitigation will necessitate interviewing witnesses and developing evidence of the defendant's history so that, should a penalty phase be reached, such information can be placed before the jury.

4. To prepare adequately for his trial and potential sentencing hearing, the defendant needs the services of criminal investigators. Because the defendant is indigent he cannot afford to pay for experts and therefore will be deprived of the effective assistance of counsel, his right to present evidence, his right to a fair trial and his right to equal protection of the laws unless he receives prior approval of the reasonable expenses of expert assistance.

5. The defendant has limited investigative resources available to him. The defendant's counsel have no formal training in criminal investigation and do not have sufficient time to interview all the witnesses that will be essential to providing the defendant with an adequate defense. A criminal investigator has the expertise necessary to locate essential witnesses and data, examine and evaluate testimony and documents using his or her special knowledge of the issues likely to be significant at a capital murder trial, issues beyond the comprehension of the ordinary layman.

6. Use of investigators is a financially sound method of trial preparation and will result in less expense to the Commonwealth than would assigning counsel to these responsibilities.

WHEREFORE, defendant prays that this Court enter the duly annexed Order and grant the relief herein requested.

Respectfully submitted,

LEE BOYD MALVO.

By _____
Co-Counsel

and

By__
Co-Counsel

Michael S. Arif, Esquire
Martin, Arif, Petrovich & Walsh
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Co-Counsel

Co-Counsel

VIRGINIA:

IN THE CIRCUUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA,

v. CRIMINAL NO: 102888
Hon. Jane Marum Roush

LEE BOYD MALVO,

Defendant

DEFENDANT'S MOTION FOR APPOINTMENT OF MENTAL HEALTH EXPERT

The defendant, Lee Boyd Malvo, by co-counsels, pursuant to Virginia Code §19.2-264.3:1, as amended, the Fifth (Due Process), Sixth (Effective Assistance of Counsel), and Fourteenth (Due Process and Equal Protection) Amendments to the Constitution of the United States, Article I, §8 (Right to Present Evidence) and §11 (Due Process) of the Constitution of the Commonwealth of Virginia and applicable case precedents, moves the court for the appointment of a qualified mental health expert or experts:

> [T]o evaluate the defendant and to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition... Va. Code §19.2-264.3:1(A).

In Support of the instant motion, it is represented that:

1. The defendant is charged with the offense of capital murder under two theories;

2. The Commonwealth's Attorney has advised that the prosecution will seek the imposition of the death penalty if the defendant is convicted of a charge of capital murder;

3. The defendant is financially unable to pay the requested expert assistance;

4. Upon information and belief, the defendant's background indicates the existence of evidence that would be relevant to at least the mitigation of punishment, if not also the defendant's mental condition at the time of the subject offense.

   The defendant's age, family history, emotional and psychological development, and history are relevant areas of inquiry which necessitate the production of evidence and the services of a psychologist or mental health expert would materially assist the defendant.

It is asserted that the defense is entitled to the requested relief as a matter of constitutional right, aside from the applicable statutory authority, where:

> [W]hen a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty a defendant is denied the opportunity to participate meaningfully in the judicial proceeding in which his liberty is at stake. *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

Moreover, the requested relief is based on a "particularized need" where the existence of such evidence would obviously be a "significant factor" in at least mitigation of the prosecution's potential demand for the ultimate penalty such that "the denial of such services would result in a fundamentally unfair trial":

> [A]n indigent defendant who seeks the appointment of an expert witness, at the Commonwealth's expense, must demonstrate that the subject which necessitates the assistance of the expert is "likely to be a significant factor in his defense," Ake, 470 U.S. at 82-83, and that he will be prejudiced by the lack of expert assistance. Id. at 83. An indigent defendant may satisfy this burden by demonstrating that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial. *Husske v. Commonwealth*, 252 Va. 203, 476 S.E.2d 920 (1996).

The aforementioned considered, it is respectfully submitted that the instant motion should be granted and that a qualified mental health expert or experts should be appointed to:

> [A]ssist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition including (i) whether the defendant acted under extreme mental or emotional disturbance at the time of the offense; (ii) whether the capacity of the defendant to appreciate the criminality of his conduct or to

conform his conduct to the requirement of the law was significantly impaired at the time of the offense; and (iii) whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant's mental state at the time of the offense.

Va. Code §18.2-264.3:1(A)

Respectfully submitted,

LEE BOYD MALVO

By

Co-Counsel

and

By

Co-Counsel

Michael S. Arif, Esquire
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Co-Counsel

Co-Counsel